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FROM
THE BUSINESS
HISTORICAL
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IN MEMORY OF
CHARLES A. MOORE
FOUNDER AND FIRST PRESIDENT OF MANNING,
MAXWELL & MOORE, INC.

GIFT OF
MARY CAMPBELL MOORE
CHARLES A. MOORE, JR.
EUGENE M. MOORE

THE
INVESTMENT
OF
TRUST FUNDS.

BY
EDWARD ARUNDEL GEARE, Esq.,
OF ST. JOHN'S COLLEGE, CAMBRIDGE, B.A., AND OF THE INNER TEMPLE, BARRISTER-AT-LAW.

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PREFACE.

SUCH inquiries as "Is it a proper investment?" "Would it be a breach of trust?" and the like, are constantly arising in the administration of trust estates; and, both to trustees and their legal advisers, the question of investing the trust fund is one that is very often surrounded by anxiety and difficulty. This is especially so, perhaps, in those numerous cases where there are conflicting, or successive, interests to be considered; the tenant for life, not unnaturally, always desiring that investment which will produce the largest income, while the remainderman is anxious that the fund should be invested on the most permanent security. The Court expects the trustee to hold the scales evenly between the two, regarding it as a breach of trust if he favour one class of beneficiaries at the expense of another.

It is hoped that this little Work may be useful when questions similar to those above suggested are being considered.

There is, the Author believes, little of a purely technical character in the following pages; and it is his hope that they may prove of some use, and perhaps interest, to the legal practitioner, the lay trustee, and the law student.

As far as the present writer is aware, the subject of the Investment of Trust Funds has never before been separately treated of, though, of course, it is incidentally dealt with in such works as Story's Equity Jurisprudence, Spence's Chancery Jurisdiction, and Lewin's Law of Trusts.

The Author has endeavoured to keep his Book within reasonable limits; and for any errors and omissions of which he has been guilty, he can only throw himself upon the indulgence of the Profession.

It will be observed, that the use of foot-notes has been entirely discarded, the Author believing that they too often serve to divert the attention at inopportune moments from the subject-matter of the text.

E. A. G.

5, NEW COURT, LINCOLN'S INN.

October, 1886.

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THE INVESTMENT OF TRUST FUNDS.

CHAPTER I.

OF THE CONDUCT EXPECTED OF THE TRUSTEE IN INVESTING THE FUND.

OF all the duties which a trustee is bound to perform, perhaps none is more important than that of seeing that the trust funds are properly invested: it is a matter of the most vital importance, both to the beneficiaries and to the trustee himself.

It is proposed, in the present chapter, to consider the question of the duty of the trustee in regard to the mode of investing the trust funds; or, in other words, the conduct expected of the trustee by the Court in investing the fund.

In his well-known Commentaries on Equity Sect. 1268. Jurisprudence, Mr. Justice Story has observed that, as a trustee is supposed merely to take upon himself the trust, as a matter of honour, con-

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science, friendship, or humanity, and as he is not entitled to any compensation for his services, at least not without some express or implied stipulation for that purpose, he would seem, upon the analogous principles applicable to bailments, bound only to good faith and reasonable diligence; and, as in the case of a gratuitous bailee, liable only for gross negligence.

“It would be difficult, however,” continues the same learned author, “to affirm that courts of equity do, in fact, always limit the responsibility of trustees, or measure their acts, by such a rule.”

This observation appears eminently true in respect of the conduct expected of trustees in the investment of trust funds.

- ¹ Eden, 143. The observation of Lord Northington in *Harden v. Parsons*, that “no man can require or with reason expect that a trustee should manage another’s property with the same care and discretion that he would his own,” has, ever since its first utterance, been referred to only with the result of drawing down strong expressions of disapprobation; and the American jurist above quoted admits that, at the present time, it cannot be asserted that a trustee, who has the entire management of an estate entrusted to him, or even a general supervision, for the benefit of those interested, is only liable for gross negligence: and that in respect to the
- Sect. 1268 b.
- Sect. 1271.

manner of *managing funds and laying out moneys on securities* considerable strictness is required by the rules of courts of equity.

These rules, however, should not be laid down, as Lord Hardwicke remarked in *Ex parte Belchier* Ambler, 219. and *Parsons*, "with a strictness to strike terror into mankind, acting for the benefit of others, and not for their own."

In *Knight v. Earl of Plymouth*, the same judge ^{1 Dick. 126.} observed that, "as a trust is an office necessary in the concerns between man and man, and which if faithfully discharged is attended with no small degree of trouble and anxiety, it is an act of great kindness in any one to accept it; to add hazard or risk to that trouble, and to subject a trustee to losses, which he could not foresee, and consequently not prevent, would be a manifest hardship, and would be deterring every one from accepting so necessary an office."

These observations are commended by the ^{Sect. 1272.} American jurist, but it does not appear to him that courts of equity have always proceeded upon so broad and liberal a basis.

It has been very commonly observed that a trustee must act with good faith in the exercise of a fair discretion with regard to the trust property, in the same manner that he would ordinarily act in reference to his own property; and that, so acting,

he ought not to be held responsible for any losses accruing in the management of the trust property : and Lord Hardwicke said that, “where trustees act by other hands, either from necessity or conformably to the common usage of mankind, they are not answerable for losses.” How the courts of equity have regarded these general principles will appear when we come to examine some of the reported cases. In the opinion of Mr. Justice Story, the courts have laid down artificial rules with regard to trustees and their duties, “which import extraordinary diligence and vigilance in the management of the trust property.”

Sect. 1272.

The mode of investment.

With a view to ascertaining what these rules are,—(in the first place as to the manner of investing trust funds),—and how they are at the present time interpreted, it is proposed to examine here, somewhat in detail, two or three of the most recent and leading cases upon this subject; in which cases the practice of the courts from early days has been reviewed.

The first case to which attention is directed is 22 Ch.D. 727. that of *Speight v. Gaunt*.

The testator in this case devised and bequeathed his real and personal estate to two trustees upon trust to convert the same, and invest the proceeds in or upon (among other securities) the stocks, funds, debentures, mortgages, or securities of any

company, corporation, or public body incorporated by charter, or a special Act of Parliament. One of the two trustees became a liquidating debtor, and though the trust funds continued to stand to the joint account and in the joint names of the two trustees, the defendant Gaunt had the entire control over them. In or about the month of October, 1880, it became necessary that some of the securities and shares—part of the trust estate—should be sold. This was done, and the proceeds of sale were paid into a bank to the credit of the trust account. It is important to observe that the broker employed in these sales, at the request of the family, was a member of a firm standing in high repute, and which firm had been employed by the testator as his brokers. The defendant Gaunt discussed with the family the question of re-investment. The trustee proposed consols; the family objected, because of the rate of interest. In the result, Yorkshire Corporation Bonds were selected for the investment, with the assent of the family, who, moreover, expressed a wish that the broker above referred to should be employed in preference to another firm, suggested by Gaunt as being his own brokers. Shortly after Gaunt saw the selected broker, and told him that it was proposed to invest 15,000*l.* in corporation stocks, and instructed him to buy 5,000*l.* Halifax, 5,000*l.*

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Gaunt.*

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Huddersfield, and 5,000*l.* Leeds, the broker stating, in reference to his commission, that he should get it from the other side. Some days later (on the 24th February, 1881) the broker brought to Gaunt a "bought note," from which it appeared that his (the broker's) firm had on that day purchased for the trustees of the testator, subject to the rules of the London Stock Exchange, the above-mentioned stocks for a total of 15,275*l.* There was no charge for commission, and no date was added after the printed word "Account" at the foot of the bought note. The broker, when he brought the bought note, told Gaunt that he wanted the money for the stocks to pay next day. As a matter of fact, the next day (25th February) was the next account or settling-day on the London Exchange. Three cheques were accordingly drawn for 5,275*l.*, 5,000*l.*, and 5,000*l.*, in favour of the broker's firm "or order," and were signed "Isaac Gaunt, for self and co-executor." Four days later Gaunt asked the broker for the securities, and was informed that they had not come yet, that he could not tell when they would arrive, as they took some time to make out. From time to time Gaunt was put off with similar excuses, and about a month after the cheques were given the broker absconded, without having procured any bonds, and having appropriated the cheques to his own

use, so that the 15,275*l.* was absolutely lost. The *Speight v. Gaunt.* action was then brought by beneficiaries under the will, claiming a declaration that Gaunt had committed a breach of trust in reference to the 15,275*l.*, and the intended re-investment thereof, and an order for him to make good the loss to the trust estate, with interest at 4 per cent.

It appeared that in the majority of cases applications for these stocks were made to the corporation by the public direct, and that in such cases the applicant obtained from the town clerk, or borough accountant, a form which was filled up and returned, that the security might be prepared. The applicant then paid the amount to the corporation bankers, who gave a receipt, to be exchanged for the security when prepared. Many applications, however, came through bankers, solicitors, and brokers, in which cases the corporation paid a commission.

There was also evidence that the bought-note, though not suggestive of fraud, was unbusinesslike in not stating whether the transaction was for cash, or, if not for cash, when payment was to be made: and the experts said they should infer that it referred to stocks not bought in the market, but direct from the corporation; but they did not think the public would do so.

Gaunt stated that when he gave the cheques he

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Gaunt.*

had no idea whether he was getting the securities direct or by purchase. It was also stated to be the usual practice where brokers were instructed to buy for them to receive the money without waiting for the actual delivery of the securities.

Argument for
plaintiffs.

It was of course contended on behalf of the plaintiffs that the employment of the broker was unnecessary and unusual, and that, in permitting the money to remain in the broker's custody without security and without necessity, there was such a want of proper precaution as rendered the trustee liable for the loss of the trust funds. It was also urged that the money should have been paid into the bank of the corporation, and that no man of common prudence would have trusted the broker implicitly, and waited many weeks without ascertaining whether the stock had actually been bought. It was, moreover, insisted that the absence of any date for completion of the purchase in the bought-note, and the non-payment of commission, ought to have excited the trustee's suspicion. Gross negligence was also to be attributed to the trustee for allowing the money to remain in the broker's hands without security and without definite information for four or five weeks.

Argument for
defendant.

For the defendant trustee the rule was relied on, that to fix him with liability it must be shown that he departed from the ordinary course which

a reasonable prudent man of business would have taken in dealing with his own money, and it was said to be the ordinary course for persons investing money in the purchase of securities, on getting the bought or advice note, to give to the broker a cheque for the amount, to be retained by the broker without security during the interval between the purchase and the transfer of the securities. *Speight v. Gaunt.*

The absence of a date in the bought-note was said to be immaterial, if it were an irregularity, there being a verbal explanation by the broker as to when the money was wanted: nor was the transaction to be impeached in the circumstances, because it was arranged that the broker should not charge commission for the investment, but should do it "nett."

The practice of inserting an indemnity clause protecting innocent trustees against loss occasioned by brokers or bankers has been recognized and extended by 22 & 23 Vict. c. 35, s. 31, showing that risks from the dishonesty of bankers and brokers stand on the same footing.

Vice-Chancellor Bacon held that the trustee V.-C. Bacon. had neglected his duty, and that his neglect of duty had caused the loss of the trust moneys. His lordship, in stating what the law on the subject is, and for centuries has been, observed that

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Gaunt.*

“a trustee who takes another man’s money into his hands is bound, whatever other duties he may have to discharge, to take care that that money shall be preserved, and not to deal with it or to do anything with it which a prudent and reasonable man would not do with his own money.”

[This proposition was referred to by the late Master of the Rolls, in the Court of Appeal, as “a very clear statement of the law,” with which he had no fault to find.]

The learned Vice-Chancellor then proceeded to apply that rule to the present case. “Could anybody,” asked the learned judge, “say that a trustee with 15,000*l.* of other people’s money in his hands should have parted with it to the broker upon that scrap of paper (the bought-note)? Certainly not. The paper upon the face of it, as a witness has said, as to Mr. Gaunt, meant ‘your money is to go to the corporations,’ and the broker, in answer to inquiries, said, in effect, ‘You are to have security for it, but it will take time to prepare the security—you must have a receipt, certificate, scrip, or something of the kind.’ Mr. Gaunt, as a man of business, accepts the excuse from the broker.”

Farther on the learned judge observed: “I say he (the trustee) is fixed with knowledge that the broker’s pretended dealings had been with the corporations, he is fixed with knowledge that the

money was to go to the corporations, and he draws ^{*Speight v. Gaunt.*} a cheque in favour of the broker." And again, "There was no earthly reason why the trustee should not have drawn the cheque in favour of the corporations that had sold him the stocks."

After pointing out that a wide field would be opened to frauds (by collusion between the trustee and the broker) if it were adopted as a rule of law, establishing a custom, that if a man employs a broker and takes from him a sale-note, he is thereupon at liberty to pay to that broker the price of the thing bought, the learned Vice-Chancellor expressed his opinion that if Mr. Gaunt had acted with the ordinary precaution which a man takes in dealing with his own property he would not have trusted the broker with the 15,000*l.* of trust-moneys. Having done so, he was ordered to make good the loss within six months, with interest at four per cent., and to pay the costs of the action.

The defendant appealed.

The Court of Appeal reversed the decision of Vice-Chancellor Bacon.

Court of
Appeal.
22 Ch. D. 739.
Appeal
allowed.
Jessel, M.R.

The late Master of the Rolls (Sir George Jessel), in giving his judgment, considered the question of the liability of a trustee who is required to make an investment on behalf of his *cestui que trust*. He stated that in his opinion a trustee ought to conduct the business of the trust in the same

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Gaunt.*

manner as an ordinary prudent man of business would conduct his own, and that beyond that there is no liability or obligation on the trustee. His lordship added, that it never could be reasonable to make a trustee adopt further and better precautions than an ordinary prudent man of business would adopt, or to conduct the business in any other way: and he proceeded to consider what the usual precautions taken by men of business, when they make investments, are.

“If the investment,” said his Lordship, “is an investment made on the Stock Exchange through a stockbroker, the ordinary course of business is for the investor to select a stockbroker in good credit and in a good position, having regard to the sum to be invested, and to direct him to make the investment—that is, to purchase on the Stock Exchange of a jobber or another broker the investment required. In the ordinary course, all that the broker can do is to enter into a contract—usually it is for the next account day. . . . Before the account day arrives, the purchasing stockbroker requests his principal to pay him the money, because on the account day he is himself liable to pay over the money to the vendor, whether a jobber or broker, and therefore he must have it ready for the account day, and, according to the usual course of business, he sends a copy of the

purchasing-note to the principal stating when the money is required to be paid, and he obtains the money from him a day or two before the account day. When he gets it, he pays it over, if it is a single transaction, to the vendor. . . . It is after payment, and very often a considerable time after payment, that is several days, that he gets the securities perfected.”

After thus stating the ordinary course of business, the learned judge expressed the conclusion arrived at by him in these words: “If, therefore, the trustee has made a proper selection of a broker, and has paid him the money on the bought-note, and, by reason of the default of the broker, the money is lost, it does not appear to me that the trustee can be liable.”

In the next place, Sir George Jessel proceeded to consider the authorities, to show that he had given the fair result of them, as they stand. He commenced with *Ex parte Belchier*: and described Ambler, 219 that case as “the leading case upon the subject.” There, the assignee of a bankrupt employed a broker to sell a large quantity of tobacco belonging to the bankrupt: the broker received the money, and ten days after died insolvent. The commissioners in bankruptcy fixed the assignee with the loss. The assignee appealed to Lord Hardwicke. It was in evidence that it was a common practice to sell mercantile goods by auction, and to employ

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Lord Hard-
wicke in *Ex
parte Belchier.*

a broker, and for him to receive the money. Lord Hardwicke reversed the decision of the commissioners: he said, "If Mrs. Parsons (the assignee) is chargeable in this case, no man in his senses would act as assignee under commission of a bankrupt;" and, farther on in his judgment, "where trustees act by other hands, either from necessity or conformably to the common usage of mankind, they are not answerable for losses." Sir George Jessel explains the words, "either from necessity or conformably to the common usage of mankind," as meaning, where in the ordinary course of business transactions an agent is employed.

5 Ves. 331.

Lord Lough-
borough in
*Bacon v.
Bacon.*

The next case referred to by the Master of the Rolls was *Bacon v. Bacon*: he sums up the view taken by Lord Loughborough in that case in these words, "Where you must necessarily employ an agent, or where you might reasonably in the ordinary course of business employ an agent, and you use due diligence in the selection of your agent, you are not liable for the consequences. You have only conducted the business in the way an ordinary prudent man of business would have done."

[It will be observed that the two cases (1) where you must necessarily employ an agent, and (2) where you might reasonably in the ordinary course of business employ an agent," are practically identical with those put by Lord Hardwicke,

namely, "where trustees act by other hands, either from necessity or conformably to the common usage of mankind."]

Speight v. Gaunt.

After briefly referring to the decision of Lord Redesdale in *Joy v. Campbell*, which dealt with the question of selecting an agent—the Lord Chancellor in that case observing, that the executor could not discharge his duty if made responsible where he remitted money to a person to whom he would have given credit, and would in his own business have remitted money in the same way—the Master of the Rolls proceeds to consider the case of *Clough v. Bond*.

1 Sch. & Lef. 328.

Lord Redesdale in *Joy v. Campbell*.

There Lord Cottenham says, in reference to a loss arising from the dishonesty or failure of one to whom the possession of part of the estate has been entrusted, "Necessity, which includes the regular course of business in administering the property, will, in equity, exonerate the personal representative." This statement, Sir George Jessel observes, is valuable on account of the interpretation of the word "necessity," as being nothing more and nothing less than the regular course of business.

3 My. & Cr. 490.

Lord Cottenham in *Clough v. Bond*.

Before proceeding to consider the case made against the defendant Gaunt by the pleader, the Master of the Rolls expressed his view in reference to the question of negligence as follows:—"My

Sir George Jessel's view as to the question of negligence.

*Speight v.
Gaunt.*

view has always been this, that where you have an honest trustee fairly anxious to perform his duty and to do as he thinks best for the estate, you are not to strain the law against him to make him liable for doing that which he has done, and which he believes is right in the execution of his duty, without you have a plain case made against him. In other words, you are not to exercise your ingenuity for the purpose of finding reasons for fixing a trustee with liability ; but you are rather to avoid all such hypercriticism of documents and acts, and to give the trustee the benefit of any doubt or ambiguity which may appear in any document, so as to relieve him from the liability with which it is sought to fix him."

The duty of
the Court.

"I think," the learned judge continues, "it is the duty of the Court in these cases where there is a question of nicety as to construction or otherwise to lean to the side of the honest trustee, and not to be anxious to find fine and extraordinary reasons for fixing him with any liability upon the contract. You are to endeavour, as far as possible, having regard to the whole transaction, to avoid making an honest man, who is not paid for the performance of an unthankful office, liable for the failure of other people from whom he receives no benefit. I think that is the view which has been taken by modern judges, and some of the older

cases in which a different view has been taken *Speight v. Gaunt.*
would now be repudiated with indignation."

Sir George Jessel then proceeded to consider the *Case made by the statement of claim.*
case made by the statement of claim. He observed, that there was no allegation in the statement of claim that the defendant ought not to have em- *Employment of a broker.*
ployed a broker, and stated, as his opinion, that the defendant was entitled to employ a broker even if he could have obtained the securities from the corporations direct. After dealing with the questions of the inference to be drawn from the bought-note by Gaunt, that the stocks were to be obtained direct from the corporations, of the absence of any date for the account-day mentioned in the bought-note, and of the absence of any charge by the broker for commission, the Master of the Rolls stated his opinion to be that the meaning of the bought-note was "a statement by the broker to *Meaning of the bought-note.*
the principal that he had bought these debenture stocks," on the Bradford Exchange, subject to the rules of the London Stock Exchange. That being so, the learned judge did not consider that the trustee was bound to suspect his own broker, and go about trying to discover from whom he had purchased. "It is quite plain," he said, "that no man in the ordinary course of business ever does anything of the kind:" and his conclusion was that there was no ground whatever for saying

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Gaunt.*

that the defendant Gaunt was guilty of negligence.

Payment to
the broker.

On the important question, whether, if the defendant knew the stocks were to be obtained from the corporations direct, he ought to have paid the broker, Sir George Jessel reserved his opinion.

Lindley, L. J.

Lord Justice Lindley described this case as one of very great importance "to trustees in general who have to invest, or who do invest, money through brokers." Was it proper, his lordship inquired, for the trustee to employ the broker at all? a trustee having no business to cast upon brokers, or solicitors, or anybody else, the performance of those trusts and the exercise of that discretion which he is bound to perform and exercise himself. On the other hand, a trustee may employ brokers and solicitors to do that which in the ordinary course of business other people would employ brokers and solicitors to do.

Employment
of a broker.

The conclusion at which the Lord Justice arrived, was that it was impossible to say that "the trustee, acting honestly, was not entitled to employ a broker" to do the business in question. Nor did the learned judge think the trustee guilty of negligence either in leaving to the broker's discretion the question from what source the broker was to obtain the desired securities, or in paying to the broker the purchase-money—the

trustee being entitled to treat the securities as *Speight v. Gaunt*.
bought by the broker in the ordinary way of
business as a broker on the Exchange.

On the important question whether "if the trustee had notice and really did know that these things had not been bought on the Stock Exchange," he ought not to have paid the purchase-money to the principals, the Lord Justice observes, "it is quite possible that he ought so to have paid it. I say nothing about that." *Payment to principals.*

As to the alleged negligence in not getting the securities, Lord Justice Lindley said that it seemed to him clear to demonstration that no discovery Mr. Gaunt could have made after the cheques were cashed could have saved the property.

Referring to the case of *Bostock v. Floyer*, in L. R., 1 Eq. 26.
which Lord Romilly held a trustee responsible for Lord Romilly
moneys given to his solicitor to invest, the Lord in *Bostock v. Floyer*.
Justice Lindley observed that the *ratio decidendi*
of that case was, that it is not "the ordinary
course of business for a trustee to place money in
the hands of a solicitor to invest. It was not a
specific investment."

[The words, "it was not a specific investment,"
appear to have a deep significance.]

After questioning the decision of Lord Romilly
in *Hopgood v. Parkin* (see *post*, pp. 90 *et seq.*), Lord L. R., 11 Eq. 74.

*Speight v.
Gaunt.*

Justice Lindley, at the close of his judgment, protested against the notion that trustees, where justified in employing agents and employing agents in good repute, and employing those agents to do that which is in the ordinary course of their business, "guarantee the solvency or honesty of the agents employed." "Such a doctrine," said his lordship, "would make it impossible for any man to have anything to do with a trust."

Bowen, L. J. Lord Justice Bowen concurred in allowing the appeal. "The proposition," his lordship remarked, "as to trustees and agents, that they

Delegation. cannot delegate, means this simply, that a man employed to do a thing himself has not the right to get somebody else to do it, but when he is employed to get it done through others he may do so."

9 App. Cas. 1. *Speight v. Gaunt* was carried to the House of Lords. After arguments, which occupied several days, the House took time for consideration.

Earl of Sel-
borne.
Amb. 218.

The Earl of Selborne, L. C., in delivering his judgment, referred to *Ex parte Belchier*, and said that that authority has been always followed, and that, in conformity with it, the statute 22 & 23 Vict. c. 35, s. 31, enacts that every instrument creating a trust shall be deemed to contain a clause exonerating the trustees from liability "for any banker, broker, or other person, with whom

Lord St.
Leonards'
Act.

any trust moneys or securities may be deposited.” *Speight v. Gaunt*.

But the Lord Chancellor proceeded to point out that neither the statute nor the doctrine in *Ex Amb.* 218.

parte Belchier authorizes a trustee to delegate at his own mere will and pleasure the execution of his trust, and the custody of trust moneys, to strangers, in the absence of a “moral necessity from the usage of mankind” for the employment of such an agency. The cases of *Rowland v. Witherden* (a) and *Floyer v. Bostock* (b), and many others, show that trustees, bound to invest, are *primâ facie* answerable for the safety of the trust funds until they are actually invested.

(a) 3 Mac. & G. 568.

(b) 35 Beav. 603.

The trust moneys are not, pending investment, to be left in the hands of professional advisers to whom, for many purposes connected with the trust, the trustee may properly have recourse.

Lord Selborne, after dealing with the facts of the case before the House, and commenting upon the evidence, observed that the first point for consideration was whether the payment of the trust moneys to the broker on the 24th of February was a breach of trust? “That,” said his lordship, “depends upon two questions, (1) whether it was proper for the respondent, as a trustee, to use the agency of a broker for the purpose of the intended investment, and (2) whether (if so) the payment of the money to the broker so employed,

Payment to the broker.

*Speight v.
Gaunt.*

Amb. 218.

Employment
of broker.

under the circumstances of this case, was justified upon the principle of *Ex parte Belchier*?"

In Lord Selborne's opinion, the trustee was entitled to give such instructions to a competent broker as he actually gave to the broker in the present case, namely, "to buy 5,000*l.* of Huddersfield, 5,000*l.* of Halifax, and 5,000*l.* of Leeds, free of commission."

That being so, was it a proper consequence of that employment that the trust moneys should pass through the broker's hands. Lord Selborne said that it appeared to him that the case would have been different if the broker had reported to the trustee that he had entered into contracts with the corporations direct: for the agency of a broker, as such, is not required to enter into a contract of that kind. The consequences of employing a broker in such a case would be the same as if a solicitor, or any other person, had been employed. In such a case there would be no sufficient practical reason for payment of the money to the agent. Moreover, the payment might be made by a cheque payable to the borrower or his order, and crossed. Such a case, in Lord Selborne's judgment, "would fall within the principle of

(a) 3 Mac. & Rowland v. Witherden (a) and Floyer v. Bostock (b)
G. 568.

(b) 35 Beav. rather than that of *Ex parte Belchier* (c)."
603.

(c) Amb. 218. But in the present case Lord Selborne thought

“the just and reasonable conclusion from the evidence” was, that the trustee was justified in paying the money to the broker, such a payment being in conformity with the usual and regular course of business on the London Exchange.

Speight v. Gaunt.

Payment to broker justified.

Upon the question whether the trustee was liable for his omission to take active measures between the date of signing the cheques in favour of the broker and the date when the broker's insolvency became known (between four and five weeks), to obtain from the broker documents of title which the broker ought to have received in exchange for the money from the seller (if the purchase had really been made), the Lord Chancellor declined to hold the trustee liable—if not liable on other grounds—“merely for believing that such an interval or delay as took place between the 24th of February and the latter part of March might be no more than it was proper or reasonable to allow, in the ordinary course of such business, for obtaining from the corporations the proper evidence of title.”

Omission to obtain documents of title.

Lord Blackburn considered the case one of general importance, so far as the application of the principles, on which the Court acts in respect to the liability of trustees to make good losses of trust funds, to the facts in evidence, will be an authority in future cases. After consideration,

Lord Blackburn.

*Speight v.
Gaunt.*

and reading the evidence, his lordship thought that the judgment of the Court of Appeal should be affirmed.

Exception to
general rule
as to manage-
ment of trust
estate; viz.—

Lord Blackburn pointed out that there is one exception to the general rule that a trustee sufficiently discharges his duty if he takes, in managing trust affairs, all those precautions which an ordinary prudent man of business would take in

(1) as to choice
of invest-
ments;

managing similar affairs of his own, viz. :—(1) A trustee must not choose investments other than those which the terms of his trust permit, though they may be such as an ordinary prudent man of business would select for his own money; and (2) however usual it may be for a person wishing to invest his own money, and instructing an agent to seek an investment, to deposit the money at interest with the agent till the investment is found, that is lending it on the agent's personal security, and is a breach of trust.

(2) as to
deposit of
money with
agent.

9 App. Cas. 1.

In *Speight v. Gaunt* no such question arose.

Ordinary
course of
business to be
followed only
while it is
usual.

Lord Blackburn also pointed out that it is while the course of business is usual that it is permissible to trustees to adopt it. His lordship instanced the practice, which has arisen within living memory, of making cheques payable to order and crossing them, and observed that when such a practice arises, it is used to avoid a risk formerly inevitable. "So that," said his lordship, "what was at one

time the usual course, may at another time be no longer usual.” *Speight v. Gaunt.*

In reference to the inquiries which the plaintiffs’ counsel suggested that the defendant ought to have made as to how the stock was to be obtained, Lord Blackburn observed, that “independent of the unreasonableness of requiring a trustee to leave his own business, and do part of what a stockbroker is generally employed to do, there would be great risk of a trustee missing the most profitable way of obtaining the investment, which a stockbroker would not.” Justification of trustee’s conduct.

“In my opinion,” Lord Blackburn observed, farther on in his judgment, “the whole question in the cause is whether it is made out that Mr. Gaunt neglected his duty as a trustee not to expose the property of his *cestuis que trust* to unusual risks, so far as to be guilty of a breach of trust.” The question in the cause. And the answer to that question, in his lordship’s opinion, greatly depended on the evidence of what was at that time the usual course of business.

Referring to the mode of payment adopted by the defendant, Lord Blackburn said, “If the usage change, a trustee who should pay in this way after it had ceased to be usual so to do, may be responsible. As to that I give no opinion. We must look to what was usual at the time he acted.” Payment to broker.

G.

C

*Speight v.
Gaunt.*

In concluding his judgment, Lord Blackburn said, that he thought the judges (of the Appeal Court) were right in thinking it not necessary to pronounce any opinion on what might have been the liability of Mr. Gaunt, in paying the trust money to the broker, if he had believed, or ought to have believed, that the transaction was one of loan negotiated with the corporations, and not of purchase in the market, for there was nothing to lead the defendant to think that such was the state of the case. "I do not," said his lordship, "think it necessary to form a final opinion on a point which does not arise."

Lord Watson. Lord Watson entirely concurred.

Lord Fitz-
gerald.

Lord Fitzgerald thought that "looseness and seeming carelessness characterized the conduct of the trustee in the absence of specific instructions to the broker, and in not withholding his final instructions until the broker had informed him what the specific securities were to be, and how to be obtained."

Payment to
broker.

It also seemed to his lordship that "the trustee, before he paid over the money on the 24th of February into the hands of the broker, might well have made some inquiries from him, which possibly might have led either to the detection of the fraud about to be perpetrated, or defeated it by either withholding the money for a time or taking

some special steps to provide for its reaching the proper destination." Lord Fitzgerald hesitated very much on the question whether there was a breach of trust in placing the trust funds in the hands of the broker: but his doubts were not so strong as to warrant him in dissenting; he was coerced to concur, though with much hesitation, in the affirmation of the decision of the Court of Appeal.

On the question of neglect of duty by the trustee in not making inquiry after the trust fund during the four or five weeks between the dates when the trust moneys were paid to the broker and when the broker's insolvency became notorious, Lord Fitzgerald said that the evidence satisfied him "that due diligence was not used, and that in allowing himself to be satisfied with the statement of the broker 'that he (the broker) could not tell when the securities would be there, they took some time to make out,' he (the trustee) was not exercising that care which a prudent and reasonable man ought to have exercised if the money had been his own."

The order of the Appeal Court was affirmed, and the appeal dismissed with costs.

So ended the case of *Speight v. Gaunt*. It appears to establish the rule laid down by Lord Hardwicke more than 130 years ago, viz., that

where trustees act by other hands, either from necessity, or conformably to the common usage of mankind, they are not answerable for losses: and,

9 App. Cas. 1. if *Speight v. Gaunt* introduces no new doctrine, it certainly establishes, on the very highest authority, the old. The statement of the rule is amplified by Lord Selborne, C., at the commencement of his judgment (p. 4 of 9 App. Cas.). To

22 Ch. D. 727. *Speight v. Gaunt*, moreover, we owe the clear statement of the law by Sir George Jessel, M. R.

Rule as stated
by Sir George
Jessel.

(at p. 739 of 22 Ch. D.), that “a trustee ought to conduct the business of the trust in the same manner that an ordinary prudent man of business would conduct his own, and that beyond that there is no liability or obligation on the trustee.”

It will be observed, too, that the difference between Vice-Chancellor Bacon on the one hand, and the judges in the Court of Appeal and the law lords in the House of Lords on the other, appears to have been rather as to the knowledge to be imputed to the trustee from the sight of a particular document, than as to the principles upon which a Court of Equity proceeds in examining the conduct of trustees. In the opinion of the learned Vice-Chancellor the bought-note told, or must be taken to have told, the trustee that the stocks were obtained direct from the corporations, whereas the Court of Appeal and the

House of Lords held that no such knowledge could be imputed to the trustee. It will be observed that several of the judges in the Court of Appeal and the House of Lords expressly abstained from saying, that, if the Vice-Chancellor had been correct in assuming against the trustee that he knew the stocks were to be acquired from the corporations direct, they should have held the trustee justified in paying the trust moneys to the broker.

The exceptions pointed out by Lord Blackburn in *Speight v. Gaunt* to the rule that a trustee dis- 9 App. Cas. 1. charges his duty if he manages the trust estate with those precautions which an ordinary prudent man of business would take in managing similar affairs of his own, are important :

1. He must not choose investments, however desirable in themselves, other than those authorized by his trust. Exceptions to general rule.
2. He must not deposit money at interest with the agent while an investment is being found: for that would be investing upon personal security.

It is also desirable to note that, according to the judgment of the same noble and learned lord, it is only while a particular course of business remains the usual course that a trustee can safely adopt it.

Fry v. Tapson. Within a year after *Speight v. Gaunt* had been
 28 Ch. D. 268. finally disposed of by the House of Lords, *Fry v. Tapson* was decided in the Chancery Division of the High Court by Mr. Justice Kay: in this
 22 Ch. D. 727; case, which it is next proposed to consider, *Speight*
 9 App. Cas. 1. *v. Gaunt* was cited. The material facts in *Fry v. Tapson* are as follow: the defendant, A. J. Tapson, and W. H. Benyon-Windsor were the English trustees of the will of John Dunn, of Tasmania, deceased. In August, 1875, a sum of 5,439*l.* 9*s.* 2*d.* New Three per Cent. Annuities was standing in their names as such trustees. The testator, by his will, directed his trustees to stand possessed of daughters' shares in the proceeds of the sale and conversion of his real and personal estate, upon trust to invest each such share in the names of the trustees, or of such persons as they should appoint for the purpose, in or upon first mortgages of real estate in Tasmania or Great Britain, or the public stocks or funds of the United Kingdom, and during the life of each daughter to pay the income of her share to her for her separate use without power of anticipation, and after her death to hold her share upon trust for her children and remoter issue as she should appoint.

One of the daughters of the testator was the plaintiff, Catharine Fry, the widow of H. P. Fry. Mrs. Fry resided in England, and, under powers

in the will, the defendant, A. J. Tapson, and *Mr. Fry v. Tapson*. Benyon-Windsor had been appointed trustees of such part of Mrs. Fry's share as might be remitted to them; the above-mentioned sum of New Three per Cents. arose from the investment of a sum of 5,000*l.* which had been so remitted to them. Mrs. Fry's co-plaintiffs were her four children. The same solicitors, Messrs. Roy & Cartwright, acted for Mrs. Fry and for the trustees; it is stated in the report that Mr. Benyon-Windsor took the more active part in administering the trust; he died in November, 1879, and his executors were co-defendants with Mr. Tapson.

Mrs. Fry, desiring a higher rate of interest than the investment in the New Three per Cents. afforded, communicated her wish to her solicitors.

In the said month of August, 1875, a surveyor named Paterson Kerr, who carried on business in London under the firm of Messrs. Paterson Kerr & Goldring, offered the solicitors a freehold house and grounds near Liverpool as a security for a loan of 5,000*l.* on mortgage. This offer was communicated by the solicitors to each of the trustees by letter: the letter to the defendant Tapson stated that Mr. Benyon-Windsor desired the writers to tell Tapson that he (Benyon-Windsor) approved of

Fry v. Tapson. the security subject to the solicitors being satisfied as to title and value. The writers observed, "the security appears to be a perfectly good one, and Mrs. Fry's income will be materially improved by the transaction." In each letter was enclosed an extract from the surveyor's communication, in which it was stated that the house and grounds cost the present proprietor between 8,000*l.* and 10,000*l.* a few years ago, and that 350*l.* per annum had been offered on a seven years' lease, but declined as the proprietor intended to sell. The extract from Mr. Kerr's communication (forwarded to the trustees) contained moreover the following statements: "We feel quite confident that this is a first-class security, and we should say that even if the borrower wished to mortgage up to the hilt, for he is, we might say, almost a millionaire. The reception rooms on the ground floor will sufficiently speak for the character of the house without giving you in the meantime further details. They consist of magnificent dining-rooms and morning-room, large library, spacious and splendidly-fitted billiard-rooms, very large and lofty hall, and most complete offices. This security, we may as well assure you, has been offered to no one else either here at Liverpool or elsewhere, and if you have a client desirous of investing this sum (*i. e.*, 5,000*l.* at four

and a-half per cent.), we feel sure you cannot do *Fry v. Tapson*. better than advise him to take this security."

On the 20th August, 1875, the defendant, A. J. Tapson, replied to this letter, that the description of the investment was satisfactory as far as it went, except that if the money was only wanted for a short time it was hardly worth while to disturb the present investment, and that he would rather that the decision about the matter should be left with Mr. Benyon-Windsor, adding "I shall be content, if he is."

Tapson was afterwards informed by the solicitors that it had been arranged that the borrower should take the money for five years certain.

About the 28th August, 1875, Kerr was verbally instructed by Cartwright, the solicitor, to report as to the value of the property.

His report was received by the solicitors, and sent by them to Mr. Benyon-Windsor: the report is set out on pages 271, 272, and 273 of the Law ^{28 Ch. D. 271} Report, and for the present purpose may, perhaps, —273. be sufficiently described, in the language of the learned judge, as "recommending the property in terms which read more like the language of an auctioneer, puffing what he had to sell, than of a man exercising a calm judgment upon its value as a security for a loan of trust money."

The solicitors of the trustees paid Kerr 75*l.* for

Fry v. Tapson. his charges: this sum being in the nature of a commission to Kerr for obtaining the loan, was afterwards repaid by the mortgagor. It appeared that the ordinary fee at Liverpool for such a report would have been about ten guineas.

Mr. Benyon-Windsor returned the report to the solicitors with a letter saying that, as the report read all right, the matter had better be followed up.

The title was therefore investigated and approved, and the mortgage deed prepared.

On the 24th September, 1875, Mr. Benyon-Windsor wrote to the defendant, Tapson, that he "quite approved of the matter, and thought the affair 'all right' in every particular."

On the 28th September the transaction was completed, the trustees advancing the 5,000*l.*, which they had raised by a sale of the New 3*l.* per Cents., to Mr. George Campbell at 4½ per cent. interest, and he executing a mortgage in fee to them of the house and grounds; the mortgage deed contained a proviso that upon punctual payment of interest, the principal money should not be called in for the period of five years. For five years from the date of the security, the interest was regularly paid.

After the bankruptcy of the mortgagor, however, the payments became irregular, and the pro-

perty fell vacant. Meanwhile, the adjoining pro- *Fry v. Tapson.*
perty had been covered with buildings of an inferior description, the back windows of which overlooked the mortgaged property. Owing to this circumstance, and to the depression of trade in Liverpool, the value of the mortgaged property decreased; in May, 1879, Kerr, the surveyor, inspected it and made a further report, from which it appeared that since 1875 a very great alteration had taken place in the immediate surroundings of the property, and that arrangements still to be completed would, when carried out, still further interfere with the value of the security. "It is, therefore," the report continued, "to us a source of gratification, that the property in 1875 afforded such an ample margin as it did for the advance then made upon it, as we hope that by taking action at once there may be no difficulty in obtaining such a price now as will secure the repayment of the mortgage."

All attempts, however, to sell the property for a sum sufficient to pay off the mortgage failed, and on the 6th June, 1883, this action was brought to obtain a declaration that the mortgage investment was an improper one, and was made by the wilful default of the trustees, and to have the mortgage realized, and any loss to the trust estate occasioned by such improper investment and wilful

Fry v. Tapsen. default made good by the trustees, with ancillary relief.

Statement of claim.

The plaintiffs by their claim alleged that the trustees had advanced the 5,000*l.* upon a report and valuation made on behalf of the mortgagor alone, and that such report and valuation showed upon the face of it that the security was not sufficient for an advance of 5,000*l.* by trustees, and further, that the property would not produce two-thirds of that amount if sold at the time of action brought.

Defence.

The defence stated that in making the investment the trustees had acted with due care and prudence, under the advice of experienced solicitors, and upon a report and valuation by a competent valuer, who was not known to them to be an agent of the mortgagor; also, that at the date of investment the security was sufficient, and that its depreciation could not have been anticipated by the trustees, and had happened through no fault or neglect of theirs; also that the change of investment was made upon the solicitation of the plaintiff, Mrs. Fry, and that the security was accepted with her knowledge and approval.

Evidence.

Evidence was given as to the comparative value of the mortgaged property in 1875 and 1884; also as to the usual practice with reference to the selection of valuers in mortgage transactions.

It was argued for the plaintiffs that Tapson's *Fry v. Tapson.* conduct in leaving the transaction to his co-trustee, *Plaintiffs' argument.* who contented himself with a valuation made by the borrower's agent—a London auctioneer without local knowledge, and with a pecuniary interest in the money being lent—amounted to wilful default and neglect; that trustees ought to exercise their own discretion in the choice of a valuer, and not leave it to their solicitors; and that the trustees lent more than half the value on house property.

For the defendants, it was contended that the *Defendants' argument.* trustees were obliged to employ solicitors to conduct the transaction; that it was an usual practice for the solicitors to select a valuer; that the trustees were not bound to follow their solicitors and valuers all over the country to see that they did their duty; and that there was nothing to fix the trustees with knowledge who the valuer was, or that there was any connection between him and the mortgagor, or between him and the writer of the extract sent to them by their solicitors.

At the commencement of his judgment Mr. Judgment. Justice Kay observed that the arguments had raised some very important questions as to the duties of trustees investing money on mortgage.

In stating the facts of the case, his lordship remarked that the effect of the correspondence

Fry v. Tapson. between the solicitors, Mr. Benyon-Windsor, and Mr. Tapson was, so far as Mr. Tapson was concerned, to make him liable for everything done by his co-trustee under the authority delegated to him by Mr. Tapson's letter of the 20th August, 1875.

General rule
as to advance
on house pro-
perty.

After commenting upon the improvident nature of the loan and the wisdom of the general rule that not more than one-half of the estimated value should be lent by trustees upon house property (see *post*, pp. 94 *et seq.*), his lordship observed that no prudent man reading the surveyor's first report would have put the value of the property as a security for trust money higher than 7,000*l.*, and that to lend 5,000*l.* upon it was obviously rashly to disregard the ordinary rule. But, in his lordship's opinion, the most incautious act was to employ Kerr to value for the mortgagees, and to accept his report as a sufficient evidence of value. He was a London surveyor without local knowledge; he was employed by the mortgagor, and pecuniarily interested in finding some one to take the security; and the solicitors called for the defence confirmed the learned judge's impression that no prudent lender, whether a trustee or not, would have been satisfied with his valuation under the circumstances.

Employment
of mort-
gagor's sur-
veyor.

Mr. Justice Kay then dealt with the argument that the trustee, having employed competent so-

licitors, who instructed Kerr, was absolved, and *Fry v. Tapson*.
 observed that *Speight v. Gaunt* had been pressed 22 Ch.D. 727;
 as an authority deciding this question in the trust- 9 App. Cas. 1.
 tees' favour.

"*Speight v. Gaunt*," his lordship said, "did not *Observations*
 lay down any new rule, but only illustrated a very *on Speight v.*
Gaunt.
 old one, viz., that trustees acting according to the
 ordinary course of business, and employing agents,
 as a prudent man of business would do, on his own
 behalf, are not liable for the default of an agent
 so employed. But an obvious limitation of that
 rule is, that the agent must not be employed out
 of the ordinary scope of his business. If a trustee
 employs an agent to do that which is not the ordi-
 nary business of such an agent, and he performs
 that unusual duty improperly, and loss is thereby
 occasioned, the trustee would not be exonerated."
 His lordship put the case of trustees, when selling
 trust property, or changing an investment, allow-
 ing trust funds to pass into the hands of their
 solicitors, and the funds being lost in consequence:
 the trustees, his lordship observed, would be liable.

If in *Speight v. Gaunt* the trustee had exercised 22 Ch. D. 727;
 no discretion as to the choice of a broker, but had 9 App. Cas. 1.
 left that to his solicitors, who had employed a man
 known to them to be untrustworthy, would the
 trustee have been exonerated? "In my opinion,"
 Mr. Justice Kay observed, "clearly not, because

Fry v. Tapson. he would have delegated to his solicitors that which was not properly the business of solicitors, but a matter as to which his own judgment should have been exercised."

Choice of a
valuer.

"Now," continued his lordship, "is it part of the ordinary business of a solicitor to choose a valuer for trustees intending to invest trust money on mortgage? To take Lord Hardwicke's words in *Ex parte Belchier*, is that a case 'where trustees act by other hands, either from necessity or conformably to the common usage of mankind?' I should suppose not."

Amb. 218.

His lordship proceeded to point out that the question was not left in doubt, eminent solicitors having been called on behalf of the defendants, who all agreed that this was not the solicitor's business. They said that, if asked to name a valuer, the ordinary course was to submit a name or names to the trustees, and to tell them all that was known to guide their choice, but to leave the choice to the trustees.

The unfortunate investment being due, in the learned judge's opinion, to the employment of a valuer whom no prudent person would have employed, his lordship said that he could not "hold the trustees exonerated because such valuer was appointed, not by them, but by their solicitors, if the fact were so."

In the result, Mr. Justice Kay held the trustees *Fry v. Tapson*. jointly and severally liable to replace the 5,000*l.*, with interest at 4*l.* per cent. from the time of the loan, against which interest the sums paid to the tenant for life were to be set off. The defendants were ordered to pay the costs of the action, they being declared entitled to the mortgage upon payment of the 5,000*l.* and interest.

The limitation stated in *Fry v. Tapson* to the rule again and again insisted upon in *Speight v. Gaunt*, is of great practical importance, namely, the employment of an agent must not be an employment out of the ordinary scope of his business. The evidence in *Fry v. Tapson* established to the satisfaction of the Court that it is not part of the ordinary business of a solicitor to choose a valuer for trustees about to lend trust money on mortgage. This selection, it would appear, is a matter as to which the judgment of the trustees should have been exercised.

Before passing away from *Fry v. Tapson*, it 23 Ch. D. 268. may be well to refer briefly to the case of *Godfrey* 23 Ch. D. 483. *v. Faulkner*, which had been decided in the previous year by the Vice-Chancellor Bacon, and which was cited by the counsel for the defendant Tapson. In *Godfrey v. Faulkner*, two trustees, one a farmer, and the other a solicitor, had in the year 1870 lent a sum of 2,400*l.*, trust money,

*Godfrey v.
Faulkner.*

with another sum of 2,600*l.*, not trust money, on the security of a freehold farm, the trustees having power to advance on contributory mortgages. The farm in question had been sold in 1868 to the mortgagor, and on that sale had been valued on behalf of the vendors, of whom the solicitor-trustee was one, at 6,895*l.* This valuation was communicated to the other trustee at the date of the mortgage: no other valuation was made. Owing to unfavourable seasons, the farm, which was on a clay soil in a wet situation, became unsaleable and unlettable: the mortgagor became insolvent.

The beneficiaries claimed against one of the two trustees and the executors of the other to be declared entitled to payment of the 2,400*l.* and certain arrears of interest.

- 23 Ch. D. 483. The head-note to the report states as follows: "*Held*, notwithstanding that no valuation was used at the date of the mortgage other than the valuation made on behalf of the vendors at the time of the sale to the mortgagor: that G., the trustee, was himself one, and solicitor of the others, of the vendors to the mortgagor: and that the sum advanced was more than two-thirds of the estimated value of the farm—that the trustees were not liable to make good the deficient security.

Test of liability.

"The test of liability always is, whether or not

the trustees have acted as prudent men would have acted in dealing with their own property. *Godfrey v. Faulkner.*

“The ‘two-thirds’ rule is not enforceable with exact strictness.” “Two-thirds” rule.

In his judgment in *Godfrey v. Faulkner*, Vice-Chancellor Bacon referred to the questions of the valuation, and the “two-thirds” rule, it having been contended, on the plaintiffs’ behalf, that in both these matters the trustees had rendered themselves liable. As to the valuation, the learned Vice-Chancellor stated the facts of the case: he said that the Charity Corporation (the vendors to the mortgagor), having this estate to sell, employed a man to value. “He values the estate,” the learned judge continued; “his evidence has been read, and the result of it is that he valued it at an excessive price, at more than its real value, and he explains in the evidence why he did that. He says: ‘I valued it not for a mortgage, but I valued it for the owners, to guide them in the sale they were about to make, at 6,890%, exclusive of timber.’” Mr. Godfrey was a member of the corporation that was going to sell this property, and he was one of the persons who had employed Mr. Wood to make the valuation, so that he was in possession of the fact of Mr. Wood’s notion that the seller might ask 7,000% for it. What a vendor may ask is one

*Godfrey v.
Faulkner.*

thing, what he may accept is another ; but neither one nor the other furnishes a reasonable ground for saying what is the true value of the thing to be bought."

Beyond the above observations, the Vice-Chancellor did not deal with the question of the valuation of 1868 : nor does he further discuss the charge made against the trustees that no proper valuation was ever taken on behalf of the trustees of the will. It may be that the learned judge considered that the solicitor-trustee was entitled to act upon the information which he had acquired when, as one of the vendors he had, two years previously to the mortgage, concurred in the employment of the valuer, who on the occasion of the sale valued the estate. Moreover, as the Vice-Chancellor pointed out, a valuation was made in 1877, by the direction of the mortgagor, when the value was estimated at 7,500*l.*, exclusive of timber. This fact appears to have had some weight with the learned

Distinguished
from *Fry v.
Tapson.*

judge. The case is very different to that of *Fry v. Tapson*, where a valuer was employed, but the trustees failed to exercise any discretion in the selection of the valuer, leaving it to their solicitors to choose one : it not being part of the ordinary business of a solicitor to choose a valuer for trustees intending to invest trust money on mortgage.

"Two-thirds" rule.

In regard to the "two-thirds" rule (see *post*, pp.

94 *et seq.*), the Vice-Chancellor made the following observations:—"Then there is the arithmetical point. It is said that without taking into account what Mr. Wood (the valuer) has designated, owing to certain circumstances, 'the latent value,' the amount advanced was more than two-thirds of the estimated value of the security; and then, it is said, the 'two-thirds' rule has been departed from. But the 'two-thirds' rule has never been applied with mathematical exactness where the amount has been exceeded by such a proportion as 300% or 500% bears to the sum advanced in this case."

It is not conceived that the learned judge intended to throw discredit upon the general rule referred to: but he did not apply it with mathematical strictness to a case where an advance of 5,000% had been made, which exceeded the amount allowed by the rule by somewhere about 400%. This, again, is a very different case to *Fry v. Tapson*, 28 Ch. D. 268. where 5,000% had been advanced—and upon house property, to which the "one-half" rule (see *post*, pp. 94 *et seq.*) applies—upon a security the value of which "no prudent man," as Mr. Justice Kay observed, "reading the valuer's report (at the date of the advance) would have put higher than 7,000%."

In *Godfrey v. Faulkner*, Vice-Chancellor Bacon declined to make the order asked for: the action 23 Ch. D. 483. was dismissed, but without costs.

Smethurst v. Hastings.

- The next case which it is proposed to consider in regard to the proposition that trustees acting in the regular course of business are protected, and in which it was contended that the defendant-trustees had acted honestly and in the regular course of business and with the consent of the beneficiary, is that of *Smethurst v. Hastings*. *Smethurst v. Hastings* was decided by Vice-Chancellor Bacon some months after *Fry v. Tapson* had been disposed of by Mr. Justice Kay. In *Smethurst v. Hastings*, *Speight v. Gaunt* was cited by the defendants' counsel, as was also *Godfrey v. Faulkner*: on behalf of the plaintiffs *Fry v. Tapson* was cited: numerous other authorities were referred to on either side.
- The facts in *Smethurst v. Hastings* appear to have been shortly as follow: Mrs. Theresa Smethurst was tenant for life, under a post-nuptial settlement, dated the 11th day of November, 1875, with an ultimate trust, in default of children (which happened), for her testamentary appointees. By the settlement it was declared that the trustees thereof should stand possessed of a sum of 10,767*l.* 3*s.* 3*d.*, Reduced 3*l.* per Cent. Annuities, upon trust to permit the same to remain in its actual state of investment, or, at any time, with the consent of Theresa Smethurst, to sell and invest the proceeds in or upon (among other

securities) leasehold or chattel real securities in England, and to pay the income to the said Theresa Smethurst during her life (but, during the joint lives of herself and her then present husband, for her separate use), and after her death to stand possessed of the trust funds for her children, and, in default of children, upon trust for such persons as she should by will appoint. *Smethurst v. Hastings.*

Theresa Smethurst died in October, 1881. By her will (having had no children) she appointed the trust funds as therein mentioned, and appointed her husband, Augustus William Smethurst, and John Cole Stogdon (the plaintiffs), her executors: the will was duly proved by both the executors.

It appears that in May, 1881, in order to increase Mrs. Smethurst's income, the trustees with her consent sold the annuities, and on the 10th of May invested part of the proceeds (namely, 7,535*l.*) upon separate sub-mortgages of eleven leasehold houses at Bedford Park, Turnham Green. Each sub-mortgage recited a lease from the Ecclesiastical Commissioners, by direction of one Carr, to the builder of the house at a ground rent, a mortgage of that lease by the builder to Carr, with usual covenants and power of sale, then the loan made by the defendant-trustees to Carr, for securing which Carr made a sub-mortgage to the trustees: the amount of the loan on the sub-

*Smethurst v.
Hastings.*

mortgage was the same as on the original mortgage. The sub-mortgage contained a covenant by Carr for payment of principal with interest, and an assignment by him of the original power of sale. One of the eleven sub-mortgages was paid off, the mortgage debt being thus reduced to 6,885*l*.

In May, 1881, the Bedford Park estate was not fully developed: the roads not completed: the drainage defective: the houses comprised in the sub-mortgages were unlet, and not completely finished.

Interest on the sub-mortgages was paid by Carr for twelve months: Carr then became insolvent.

On the 18th December, 1883, the trustees transferred the sub-mortgages to the plaintiffs, who thereupon entered into possession of the property.

The property proving unsaleable, the executors of Theresa Smethurst, on the 22nd May, 1884, commenced this action against the trustees, alleging that since the transfer the plaintiffs had discovered that the houses were a wholly insufficient security for the sum advanced, and unfit for the investment of trust funds: that the selling value was less than the money advanced: that the advance was made without proper inquiry or valuation: that precautions proper to be taken by trustees

lending trust funds on the security of leasehold property were not taken. At the trial, the plaintiffs contended also that the investment on sub-mortgage, and on separate securities, was improper: it was argued that a sub-mortgage is only a security upon the money due under the original mortgage, and therefore nothing more than a personal security; upon which, in the present case, the trustees had no power to invest. *Smethurst v. Hastings.*

The plaintiffs claimed payment by the defendants of 6,885*l.*, with certain interest, and submitted, on such payment, to transfer the securities to the defendants: in the alternative, the plaintiffs asked that the sub-mortgages should be realized, and that the defendants should make good the loss arising from the investments. *Plaintiffs' claim.*

The defendants alleged that a proper valuation was made prior to the advance, and with Mrs. Smethurst's privity. Another defence—not material to the present purpose—was raised as to the adoption and acquiescence by the executors of and in the investments, evidenced by their taking the transfers from the defendants with knowledge of all the circumstances. The defendants, moreover, denied that the houses were entirely of a speculative character, and insisted that they had acted with respect to the investment *bonâ fide*, without negligence, with reasonable care. *Defendants' case.*

*Smethurst v.
Hastings.*

and diligence, and following the usual and regular course of business pursued by ordinary prudent men in making such investments.

Admission
that more
than half the
value was
advanced.

It was admitted at the trial that more than half the estimated value of the property had been advanced: but there was a conflict of evidence as to whether the valuation on which the defendants acted was an independent one made on their account, or whether it was first obtained by Carr for his own purposes, and then accepted by the defendants: Carr not being called as a witness.

Judgment.

Vice-Chancellor Bacon said, at the commencement of his judgment, that it was not clear whether the valuation was made on behalf of the mortgagor or mortgagees, though the tone of the document seemed to indicate that it had been made in the interests rather of a borrower than a lender.

Consent by
beneficiary.

As to Mrs. Smethurst's consent to the investment in question, the learned judge said that it was given in full reliance upon the discharge by the defendants of the duties they had undertaken.

State of the
property.

The houses, as the Court found, were unfinished, the roads not practically usable, the drainage insufficient.

In this state of circumstances the defendants agreed to lend Carr this sum of 7,535*l.* on the security of the eleven houses.

The learned judge also stated that the plaintiffs *Smethurst v. Hastings.* had proved that the value of the property included *Value of security.* in the mortgages was very considerably less than that stated in the valuation on which the defendants acted.

After disposing of the defence grounded upon adoption and acquiescence, and which defence entirely failed (the judge remarking that there was no pretence for the allegation that the plaintiffs, when they took the transfers, knew of the circumstances under which the investments had been made), Vice-Chancellor Bacon proceeded to deal with the further topic of defence, namely, that the defendants procured a proper valuation to be made by competent surveyors, with the privity of Mrs. Smethurst, before advancing the money; and that they made all proper inquiries and took all precautions proper to be taken by trustees advancing trust funds on the security of leasehold property.

These allegations, the learned judge said, were *Defence not supported by the evidence.* not supported by the evidence.

Referring to the cases cited, the Vice-Chancellor said that it was perhaps true that of late the Courts have been less severe than they were in former times in fixing trustees personally with such losses; "but," said his lordship, "there is *One rule never de-* one clear, homely, intelligible, rule which has parted from.

*Smethurst v.
Hastings.*

Application
thereof.

never been departed from, in times ancient or modern, viz., that a trustee is bound to act in the execution of his trust as a prudent man would in dealing with his own property. Applying that rule to the present case, can it be said that any prudent man, having to invest nearly 7,000*l.* upon leasehold property with a view to present income (as was Mrs. Smethurst's plainly-expressed desire) would venture his money to the extent of more than half the estimated value of the property, when that property consisted of houses recently built, unoccupied, not wholly finished, producing no fixed certain rents, burdened with ground-rents and insurances, liable for future repairs, imperfectly drained, and without proper roads?"

"Upon the whole case," the learned judge observed, farther on in his judgment, "I am of opinion that the investment of the several sums composing the aggregate trust funds upon eleven mortgages of houses which would not be immediately occupied, and from which rents were not secured nor receivable, was a breach of the duties of the trustees, and a violation of the rule which requires trustees to deal with their trust funds as a prudent man would deal with his own property."

The defendants were therefore ordered to pay to the plaintiffs the sum of 6,885*l.*, and an ac-

count was directed as to interest: the plaintiffs to transfer the securities to the defendants, and to account for all rents received by them since taking possession of the houses. The defendants were ordered to pay the costs of the action up to the trial, future costs being reserved.

In this case the defendants gave notice of appeal, and the appeal was set down, but did not come on for hearing, the action being compromised.

The last case which it is proposed to consider at present in reference to the conduct expected of the trustee when investing trust funds is that of *Whiteley v. Learoyd*, which was also before Vice-Chancellor Bacon, in the early part of the year 1886, and in which *Speight v. Gaunt*, *Fry v. Tapsen*, *Godfrey v. Faulkner*, and *Smethurst v. Hastings* were all cited, besides other cases. In *Whiteley v. Learoyd*, the trustees were authorized to invest a sum of 5,000*l.* on (among other securities) "real securities in England or Wales." One of the plaintiffs was entitled to the income for life: her three infant children, entitled in remainder, were co-plaintiffs; 3,000*l.*, part of this sum of 5,000*l.*, was invested by the defendant trustees in the year 1878, upon a mortgage of a freehold brickfield with machinery, kilns, and buildings thereon; the remaining 2,000*l.* was, in the same year,

*Whiteley v.
Learoyd.*

invested on mortgage of four small freehold houses. In October, 1884, the mortgagors of the brickworks were adjudicated bankrupts. In April, 1879, the defendants went into possession of the four small houses. In consequence of the failure of the investments this action was brought against the trustees, claiming (*inter alia*) that they might be ordered to invest 5,000*l.* or so much thereof as was not properly invested upon the securities mentioned in the will. The defendants were charged with investing the 5,000*l.* upon securities not authorized by the will, with not making proper inquiries as to the values of the properties, and with not causing proper valuations to be made before advancing the trust funds. The defendants alleged that the investments were authorized by the will, that they had made proper inquiries, and had employed an experienced firm of surveyors to value and report, that they were advised by such firm that the properties formed good security for the sums proposed to be advanced, and that the securities, when taken, were of sufficient value to secure the amounts advanced. The Vice-Chancellor observed, in the early part of his judgment, that the trust upon which the defendants held the 5,000*l.* did not authorize them to advance any part of it on the security of a trade, and, in his lordship's opinion, part of it was in fact advanced

Judgment.

upon the security of a trade. The learned judge *Whiteley v. Learoyd*.
declined to follow the decision of the late Mr. Justice Pearson, in *Re Pearson* (see *post*, pp. 92 *et seq.*), 51 L. T., N. S. 692.
and observed that, with the exception of that case, he knew of no case "which says that the trade of brickmaking falls within the description of a 'real security.'" On the ground that the money was really advanced upon the security of a trade, the Vice-Chancellor appears to have decided this part of the case against the defendant trustees. After carefully reviewing the evidence, his lordship says, "Giving the trustees credit for the most honest intentions, was it right for them to invest 3,000*l.* upon property of this description—a sum which they could not hope to get back unless the mortgagors' business should turn out to be profitable?" In the result the learned judge held that the trustees had not acted in the matter "as prudent persons would have acted in their own concerns," and the defendants were ordered to pay the 3,000*l.* into court. On the other part of the case—the investment of the 2,000*l.*—the decision was in the defendants' favour, apparently on the ground that the four houses came clearly within the description of "real securities," and had been duly valued before the advance was made and pronounced by the valuer to be a good security for 2,000*l.* From this decision both parties appealed, and both appeals were dismissed. It should be

*Whiteley v.
Learoyd.*
Appeals.
W. N. 1886,
p. 148.

observed, however, that Lord Justice Cotton, in the Court of Appeal, appears to have held that the brickfields were real property, and, therefore, within the power of investment: but his lordship and the other members of the Court held that a prudent man would not have advanced so much money on such a property, and the trustees were held liable in respect of this investment.

Observations
on the cases
considered.

Such are some of the more recent cases which illustrate the manner in which the Courts of Equity, at the present time, deal with trustees in discharging their important duties as to the investment of trust funds: so far as the conduct of the trustee in investing the funds is concerned. The cases referred to are of course illustrations only: illustrations, that is, of the general rule again and again recognized and referred to in all these cases, sometimes laid down in exact terms, that the trustee ought (to repeat the lan-

22 Ch. D. 727,
at p. 739.

guage of Sir George Jessel in *Speight v. Gaunt*) "to conduct the business of the trust in the same manner that an ordinary prudent man of business would conduct his own." It is not probable that in any two cases the same state of facts will ever occur: and it is to each different state of facts that the Court has to apply the rule as the case comes before it. So that the cases discussed above can do no more than illustrate the rule: that is to say, they can only show how the rule was

applied to a particular state of facts: how the rule would be applied to a state of facts where this or that one important circumstance may chance to differ, must of course be to some extent a matter of speculation and uncertainty. The Court must in each case decide whether the trustees have acted as prudent men would have acted in dealing with their own property.

But one important use which may be made of these same cases is to observe how a rule, laid down in apparently general terms in one case, receives a limitation or qualification in another. Take, for example, the employment of an agent. *Speight v. Gaunt* confirmed the rule that a trustee acting according to the ordinary course of business, and employing agents as a prudent man of business would do on his own behalf, is not liable for the default of an agent so employed. *Fry v. Tapson* supplies a necessary limitation of that rule, viz., the agent must not be employed out of the ordinary scope of his business. So that while a trustee investing trust money on mortgage may employ a solicitor to do the solicitor's proper part of such business, he must not delegate to him a duty beyond the solicitor's proper province, *e. g.*, the selection of the valuer to value on the part of the intending mortgagees. So, also, while a trustee investing upon such a security as corporation

bonds, may point to *Speight v. Gaunt*, and say, on the authority of that case, I am justified in paying the trust moneys to the broker, the limitation suggested by Lord Blackburn warns him that he can only do so with safety while it remains the usual course of business.

And this further qualification seems to suggest itself from a perusal of the cases, namely, that a trustee may not do all that which an ordinary prudent man of business might do in managing his own concerns, but that which the prudent man of business would do *while strictly following the ordinary course of business*. For instance, many an ordinary prudent man of business, having complete confidence in his solicitor, and intending to invest his own money on mortgage, might well say to the solicitor, "Get an independent person to value the proposed security." But such a course is not open to the trustee investing trust funds; he must exercise his own discretion in selecting the valuer; that is to say, he must strictly follow the ordinary course of business; he must himself employ a valuer—whose business it is to value—to make the valuation; just as he himself employs a solicitor to prepare the agreement or the mortgage deed. If he wishes to employ an agent to do that which he is justified in employing an agent to do, he must select the agent who is to do that particular business.

CHAPTER II.

OF THE ADVICE OBTAINABLE BY TRUSTEES.

IN this chapter, it is proposed to consider shortly the means of obtaining advice, in regard to the management of the trust funds, which are generally open to trustees.

And in the first instance it appears desirable to call attention to the provision made by Lord St. Leonards' Act for enabling trustees or executors to apply to a judge of the Chancery Division of the High Court for the opinion and advice of the judge on matters arising in the management of the trust property.

Applications
to judge for
advice, &c.,
under 22 & 23
Vict. c. 35.

Sect. 30 of the act in question is as follows:—

“Any trustee, executor, or administrator shall be at liberty, without the institution of a suit, to apply by petition to any judge of the High Court of Chancery—(now the Chancery Division of the High Court of Justice)—or by summons upon a written statement to any such judge at chambers for the opinion, advice, or direction of such judge, on any question respecting the management or administration of the trust property, or the assets of any testator or intestate, such application to be served upon or the hearing thereof to be attended by all persons interested in such applica-

Indemnity to
trustees.

tion, or such of them as the said judge shall think expedient; and the trustee, executor or administrator, acting upon the opinion, advice, or direction, given by the said judge, shall be deemed, so far as regards his own responsibility, to have discharged his duty as such trustee, executor, or administrator, in the subject-matter of the said application; provided, nevertheless, that this act shall not extend to indemnify any trustee, executor, or administrator, in respect of any act done in accordance with such opinion, advice, or direction as aforesaid, if such trustee, executor, or administrator shall have been guilty of any fraud or wilful concealment or misrepresentation in obtaining such opinion, advice, or direction; and the costs of such application as aforesaid shall be in the discretion of the judge to whom the said application shall be made."

Order LII. of
the Rules of
1883.

The following rules of Order LII. of the Rules of the Supreme Court, 1883, now regulate the procedure under the section above set out.

19. All petitions, summonses, statements, affidavits, and other written proceedings for the opinion, advice, or direction of a judge under the 30th section of the act 22 & 23 Vict. c. 35, shall be intituled in the matter of that act, and in the matter of the particular trust, will, or administration, and every such petition or statement shall state the facts concisely, and shall be divided into paragraphs numbered consecutively.
20. At the time when any such summons as in the last preceding rule mentioned is sealed,

the statement upon which the same is grounded shall be left at the chambers of the judge to whom the same is assigned, and shall on the conclusion of the proceeding be transmitted to the chancery registrar by the chief clerk with the minutes of the opinion, advice, or direction given by the judge, and the registrar shall cause such statement to be transmitted to the central office to be there filed.

21. Every such petition or summons as in Rule 19 mentioned shall be served seven clear days before the hearing thereof, unless the person served shall consent to a shorter time.
22. The opinion, advice, or direction of the judge, as in Rule 19 mentioned, shall be passed and entered and remain as of record in the same manner as any order made by the court or a judge, and the same shall be termed "a judicial opinion," or "judicial advice," or "judicial direction," as the case may be.

As a general rule, it appears that the applica-^{Petition.}
tion should be made by petition. In *Re the Trusts* ^{5 Jur., N. S.}
of the Will of S. G. Dennis, where the application ^{1388.}
was in the first instance made in chambers, Vice-Chancellor Stuart expressed an opinion that it was "far more desirable to have embodied in a petition that statement of facts upon which his opinion was asked."

Sect. 9 of the act 23 & 24 Vict. c. 38, provides ^{23 & 24 Vict.}
that a petition or statement under Lord St. Leo-^{c. 38.}

Counsel's
signature.
Ord. XIX.
r. 4.
Sect. 100 of
the Act of
1873.

30 W. R. 596.

nards' Act must be signed by counsel. And such signature is still necessary, notwithstanding Ord. XIX. r. 4, of the Rules of 1883, as interpreted by sect. 100 of the Act of 1873. In *Re Boulton's Trusts*, Mr. Justice Chitty, referring to the last-mentioned rule, pointed out that general provisions in an Act of Parliament do not override special provisions contained in an earlier act; and also suggested other reasons why Rule 4 of Ord. XIX. could not be applied to applications for advice under Lord St. Leonards' Act.

Johns. 625.

Affidavits not
admissible.

Service.

6 Jur., N. S.
530.

O. LII. r. 19.

Questions
entertained—
Investments.

L. R., 15 Eq. 68.

L. R., 18 Eq. 280.

L. R., 7 Eq.
463.

In *Re Muggeridge's Trusts*, Vice-Chancellor Wood said that the opinion of the Court was to be obtained on the trustee's statement of the facts, and that affidavits were not admissible; also, that the petition should not, in the first instance, be served on any person, but application should be made in chambers for a direction as to service; but see Rule 21 of Ord. LII. *supra*; also *In re Green's Trusts*, where Vice-Chancellor Kindersley stated the proper course to be pursued. And in Rule 19 of Ord. LII. it will be observed that *affidavits* are referred to.

Under this act the Court will give advice as to investments, as in *Re French's Trusts*: see, also, *In re Clergy Orphan Corporation*. Upon such an application Lord Romilly, in *Re Peyton's Settlement Trust*, advised the trustees that a power to

invest in the purchase of lands in fee simple in possession, authorized an investment in the purchase of freehold ground rents. So, in *Re Langdale's Settlement Trusts*, Vice-Chancellor James L. R., 10 Eq. 39. advised the trustees that the bonds of a French railway company, the payment of the capital on which within fifty years was secured by a sinking fund guaranteed, together with interest in the meantime, by the Imperial Government, were not "securities of a foreign country," the trustees having power under the settlement to invest in such securities. In *Re Wedderburn's Trusts*, Vice-Chancellor Malins advised (see *post*, p. 75), that 9 Ch. D. 112. trustees coming within the act 23 & 24 Vict. c. 38, 23 & 24 Vict. c. 38. may invest in any securities in which cash under the control of the Court may be invested, notwithstanding prohibitive or restrictive words in the instrument creating the trust. And upon an application under the act, the same learned judge, in *In re T*—, expressed an opinion that 15 Ch. D. 78. the consent of a married woman of unsound mind not so found, whose written consent was required to investments by the trustees, might be dispensed with.

But upon such applications the Court will not entertain questions of detail for the proper determination of which affidavit evidence is required. Questions not entertained.

In *Re Barrington's Settlement*, trustees having 1 J. & H. 142.

power to purchase lands on the request of tenants for life, desired the opinion of the Court as to the propriety of applying 1,200*l.* on such request in permanent improvements and repairs; no answer was given on the petition. Vice-Chancellor Wood said, "The case goes into details with which the Court cannot effectually deal without having a superintending power, and being informed by affidavits: whereas under this statute the facts must be taken to be as they are stated in the petition of the trustees, who take the risk of any misstatement; and the Court has no means of exercising any controlling power over the subject-matter."

No inquiries directed.

Johns. 628.

No appeal;
but see *Re Norris, infra.*

W. N. 1883,
35.

W. N. 1883,
65.

Costs.

No inquiries will be directed on the application: see *Re Mockett*: in that case Vice-Chancellor Wood also expressed an opinion that proceedings under the act admitted of no revision of his judgment: but whether this is so since the Judicature Act, 1873, seems doubtful. In *In re Norris* a petition was presented for the opinion of the Court as to the propriety of accepting an offer of a corporation to purchase certain freehold houses. Mr. Justice Pearson answered the question in the negative. The petitioners appealed. The Court of Appeal appears to have entertained the appeal, and to have differed from Mr. Justice Pearson. As a rule the costs of the application will be

ordered to come out of the *corpus* of the trust estate: but where the order made on the petition dealt only with the income of the trust fund, the Lords Justices ordered the costs to be defrayed out of the income of the trust property: *Re* — 8 W. R. 333. (a lunatic not so found).

By Ord. LV. r. 3 (g) of the Rules of the Supreme Court, 1883, it is provided that a trustee ^{Applications under Ord. LV. r. 3 (g).} may take out as of course an originating summons for the determination of any question arising in the administration of the trust. Rule 5 of this Ord. LV. r. 5. Order provides for the service of such summons.

In the case of *In re Household* an originating 27 Ch. D. 553. summons was taken out under Rule 3 of Ord. LV. asking that the trustees of the will might advance to the tenant for life (there being no investment clause in the will) part of the residuary personal estate for the purpose of stocking and cultivating a farm forming part of the real estate. On evidence that the outlay would be to the advantage of infant remaindermen, Vice-Chancellor Bacon made the order as asked, the tenant for life undertaking to expend the money advanced as mentioned in the summons.

The case of *In re the Trusts of the Will of S. G. Dennis* has been already referred to (*ante*, p. 61). At the close of his judgment in that case, Sir John Stuart, V.-C., said he wished very ^{5 Jur., N. S. 1388. Opinion of counsel.}

much that opinions such as those contemplated by the act (Lord St. Leonards'), and to be binding upon the parties, could be given by Queen's counsel, and other members of the Bar. *Apropos* of counsel's opinion, it seems desirable, in concluding this chapter, to refer very briefly (1) to the right of trustees to take counsel's opinion, and (2) to the protection afforded them by acting under the advice of counsel :—

8th edition,
p. 636.
1 Beav. 600.

(1) The rule on this point is thus stated in Lewin :—“ So a trustee may give fees to counsel, and shall have allowance thereof.” In *Poole v. Pass*, the counsel for the defendant trustee asked for his costs as between solicitor and client, and the costs of the opinion under which the trustee had acted. Lord Langdale gave these costs, observing, “ I think no trustee would be safe unless such costs were allowed.”

(2) As to the protection afforded to trustees by acting under counsel's opinion, it seems to be the rule that, while a trustee who takes upon himself to act upon a particular construction of a will without seeking the direction of the Court will not be protected by the opinion of counsel, however eminent, yet where a trustee brings an action to protect the trust estate under the advice of counsel, though not absolutely indemnified by such advice from liability to the costs of the

action, as between himself and his beneficiaries, such advice would go a long way to justify the proceedings, if instituted *bonâ fide*.

In a very recent case—*Stott v. Milne*—(where ^{25 Ch. D. at P. 714.} trustees had brought actions under the advice of counsel), the Earl of Selborne, L. C., said that, under the circumstances of the case, the Court “ought to be clearly satisfied that the actions were improper before reversing the decision that the costs of them were properly payable out of the estate.”

His lordship thought, however, that the reason given for allowing them in the decree appealed from was not sufficient, because it merely stated that they were brought under the advice of counsel. “Now,” continued his lordship, “I cannot say that because an action is advised by counsel it is always and necessarily one which trustees may properly bring. The advice of counsel is not an absolute indemnity to trustees in bringing an action, though it may go a long way towards it.”

CHAPTER III.

OF PERMISSIBLE INVESTMENTS.

It is a well-known rule that trustees are not justified in allowing the trust funds to lie idle: that is to say, that where the trust money is not to be applied, either shortly or immediately, to the purposes of the trust, the trustee must make the fund productive by a proper investment thereof.

It may be stated generally, that where there is a power to invest, such power carries with it the power to vary the investments: *In re Clergy Orphan Corporation*. And the Court will not in general control the discretion of trustees as to varying investments: *Lee v. Young*.

L. R., 18 Eq.
280.

2 Y. & C. Ch.
Ca. 532.

In this chapter it is proposed to consider upon what securities a trustee may invest the trust fund.

Before proceeding to do this, it may be premised that a trustee may find himself in any one of the following positions: (a) he may be an original trustee of a settlement, with (1) moneys paid to him for investment, or (2) stock transferred into his name with a power to vary such investment, or (3) with a trust or a power to sell real estate and invest the proceeds: or (b) he may be appointed a trustee by will: or (c) he may be appointed a new

trustee of an existing trust, where the investments have already been made.

It is presumed, that his duty in regard to the investment of the trust estate is very much the same in all cases: that is to say, if there is money to invest, he must see that proper investments are made; if the trust property does not consist of money, he must see that proper investments have been made; and if he finds that the trust estate consists of improper investments, he must see that such improper investments are exchanged for others of a proper character; either such as the instrument, of which he is a trustee, sanctions; or, if that instrument is silent on the subject, such as the Court allows trustees to invest upon.

The rule as to conversion may be briefly stated Rule as to conversion. as follows: where the testator gives personal estate in trust for several persons in succession, and the subject of the bequest is either of a wasting nature, as leaseholds, or property producing a high rate of interest in proportion to its money value, as railway shares or foreign bonds, the persons entitled in expectancy have a right to call for a conversion into an authorized security, an intention being presumed that the estate should assume a permanent character, and so become capable of succession. This is the rule of the

Court, and trustees are bound to observe it in administering property out of Court. If they fail to do so, they will be liable, and the remainderman is entitled to a share of any extra profits

4 Russ. 195. of annual produce : *Dimes v. Scott*.

To proceed then with the question, upon what securities may a trustee properly invest? Let us, by way of answer, consider upon what securities the Court permits investment, where the instrument creating the trust is silent upon the subject; and also, where there is a power to invest, what the Court considers a proper exercise of that power.

Until certain recent statutes, which will be referred to immediately, trustees of an instrument containing no express power of investment were accustomed to invest in 3l. per cent. annuities only.

Attention has been called to the observation of
9 App. Cas. 1. Lord Blackburn in *Speight v. Gaunt* (*ante*, p. 24), that the trustee may not choose investments, however desirable in themselves, other than those authorized by his trust; it may be added that, formerly, where the instrument was silent, he was practically debarred from exercising any choice. But he could always invest in one of the government or bank annuities, the reason being, as
3 Atk. 439. pointed out by Lord Hardwicke in *Trafford v. Boehm*, that the directors have no power "by mis-

management or speculation to hazard the property of the shareholder." Mr. Lewin, in his well-known Treatise, observes, that "if a trustee who ^{Lewin's Trusts, p. 314 (8th ed.).} has money in hand, which he ought to render productive, invest it on this security, he has done his duty, and will not be answerable for any subsequent depreciation."

By the statute 22 & 23 Vict. c. 35 (Lord St. ^{22 & 23 Vict. c. 35.} Leonards' Act), it is enacted (sect. 32) as follows:—

"32. When a trustee, executor or administrator shall not, by some instruments creating his trust, be expressly forbidden to invest any trust fund on real securities in any part of the United Kingdom, or on the stock of the Bank of England or Ireland, or on East India stock, it shall be lawful for such trustee, executor or administrator to invest such trust fund on such securities or stock; and he shall not be liable on that account as for a breach of trust, provided that such investment shall in other respects be reasonable and proper."

In *In re Warde's Settlement*, it was held "that ^{2 J. & H. 191.} the 32nd section of the act refers to those cases only where a trustee has power, independently of the act, to make some investment of his trust fund, and operates in those cases, but in those cases only, to enlarge the class of legitimate investments." Where the fund is already invested,

and the trustee has no power to vary any investment, the section does not apply.

41 L. T., N. S. (Ch.) 636. It is true that in *Waite v. Littlewood* the contrary was held; but in the last-mentioned case

2 J. & H. 191. *Re Warde's Settlement* was not cited.

5 Jur., N. S. 1236. In *Re Miles' Will*, Sir John Romilly held that sect. 32 does not apply to trusts created by an instrument dated before the act.

23 & 24 Vict. c. 38. Sect. 12, however, of the Amendment Act (23 & 24 Vict. c. 38) has made sect. 32 of the original act retrospective.

Johns. 528. The Court having refused, in *Re The Colne Valley and Halstead Railway*, to sanction, under the 22 & 23 Vict. c. 35, an investment in stock created under the India Loan Act (22 & 23 Vict. c. 39), it was enacted by the first section of 30 & 31 Vict. c. 132, that the words "East India Stock" are to be taken to include as well the old East India Stock as "East India Stock charged on the revenues of India, and created under and by virtue of any Act of Parliament which received her Majesty's assent on or after the 13th day of August, 1859."

22 & 23 Vict. c. 39. It is the fact that the stock under the India Loan Act has been issued under the name of "India" and not "East India" Stock: upon this a doubt has arisen whether "India" Stock is

within the purview of the act 30 & 31 Vict. ^{30 & 31 Vict. c. 132.} c. 132: the learned author of Lewin on the "Law of Trusts" thinks that the doubt is "purely technical, and has no solid foundation." It is also observed, in the same treatise, that the stocks created by later East India Loan Acts are thereby expressly directed to be deemed East India Stock within the 32nd section of the 22 & 23 Vict. c. 35, ^{22 & 23 Vict. c. 35.} unless and until it is otherwise provided by Parliament.

In *Ex parte St. John Baptist College, Oxford*, the 22 Ch. D. 93. late M. R., Sir George Jessel, observed, "It has always been held that New East India Stock was within the intention of the General Order (*i. e.* the Order of 1st February, 1861, *post*, p. 74). The provisions of the act (22 & 23 Vict. c. 35) have been extended to new stocks, and by analogy the general order may be extended to them also." It was, therefore, held that the cash in question in that case might be invested in stock created by the 42 & 43 Vict. c. 60, being New $3\frac{1}{2}$ per cent. East India stock.

The India 4l. per cent. stock is the East India ^{India stock adopted by Court.} stock now usually adopted as an investment by the Court. Seton, 488.

In *Green v. Angell*, it was held that railway ^{W. N. 1867, p. 305.} stock, upon which interest at 5l. per cent. is charged

upon the revenues of India, is not within the meaning of the 30 & 31 Vict. c. 132, s. 1.

Power to
Court to make
orders as to
investment.

23 & 24 Vict.
c. 38, s. 10.

Sect. 11.

The Court of Chancery was empowered by sect. 10 of the 23 & 24 Vict. c. 38, to make general orders as to the investment of cash under the control of the Court (*post*, p. 201); and by sect. 11 of the same act, it is enacted that "when any such general order shall have been made it shall be lawful for trustees, executors, or administrators having power to invest their trust funds upon government securities, or upon Parliamentary stocks, funds, or securities, or any of them, to invest such trust funds, or any part thereof, in any of the stocks, funds, or securities in or upon which by such general order cash under the control of the Court may from time to time be invested."

Difference
between "go-
vernment"
and "public"
securities.

12 Sim. 426.

It may be observed here that as far back as 1842 the Vice-Chancellor of England (Sir Lance-
lot Shadwell) had pointed out, in *Sampayo v. Gould*, the difference between the expressions "government securities" and "public securities." His Honour there observed, at p. 435, "this Court does not allow property to be invested in public securities which are not government securities."

Order now
regulating
investments
by Court.

The order now regulating the investment of cash under the control of the Court (and substituted for the General Order of the 1st of February,

1861), is Ord. XXII. of the Rules of the Supreme Court, 1883; rule 17 of that order is as follows:—

“r. 17. Cash under the control of, or subject to Ord. XXII.
r. 17. the order of, the Court may be invested in Bank stock, East India stock, exchequer bills, and 2l. 10s. per cent. annuities: and upon mortgage of freehold and copyhold estates respectively in England and Wales, as well as in consolidated, reduced, and new 3l. per cent. annuities.”

In regard to sect. 11 of the 23 & 24 Vict. Absence of restrictive words in sect. 11 of 23 & 24 Vict. c. 38. c. 38, it may be observed that the words “where they (*i. e.* trustees), shall not by the instrument creating the trust be expressly forbidden” to invest as therein is mentioned, are wanting, and the section contains no such restrictive words as are found in the 32nd section of the 22 & 23 Vict. 22 & 23 Vict c. 35. c. 35. Vice-Chancellor Malins, therefore, in *In re Wedderburn's Trusts*, held that trustees 9 Ch. D. 112. coming within the operation of the 23 & 24 Vict. c. 38, s. 11, may invest the trust funds in any securities in which cash under the control of the Court may be invested, notwithstanding prohibitive or restrictive words in the instrument creating the trust.

Before the act (23 & 24 Vict. c. 38), it had been held (*Pride v. Fooks*), that a trustee, who, being 2 Beav. 430. directed by the will of the testator to invest the

residue in consols and to accumulate the dividends, invested it on mortgage of real estate, was liable to make good the amount of stock which would have been purchased in consols, together with the amount of accumulation which would have been produced by a proper investment of the dividends of such stock.

³ De G., F. & J. 170.

Transfer from consols to India stock.

Difference where fund not in Court.

Old East India stock has ceased to exist.

In *Cockburn v. Peel* the Court declined, in the absence of special circumstances making the increase of the income of the tenant for life beneficial to those entitled in remainder, to authorize the transfer of a fund from consols into East India stock, the latter investment producing a larger income, but likely to cause a loss to those entitled in remainder; the East India stock being more liable to be paid off than the 3½ per cent. annuities. But in giving judgment in this case, Lord Justice Turner observed, "I desire to be understood as not intending to embarrass trustees in the exercise of their discretion, which the statute gives to them where the funds are not in Court. I think they will be fully entitled to the protection of the Court where they act *bonâ fide* in the exercise of that discretion."

The old East India stock, however (which was the stock referred to in *Cockburn v. Peel*), has now been redeemed or commuted, and has ceased to exist.

⁴ De G., F. & J. 29.

In *Hume v. Richardson* the circumstances were

shortly as follow :—A testator directed his trustees to convert his personal estate, and invest the produce in land, and in the meantime to invest it in the funds and pay the dividends as directed by his will. The testator died shortly before the passing of the 22 & 23 Vict. c. 35, possessed of bank stock and East India stock. On a special case, to obtain the opinion of the Court, the Lords Justices (who heard the case in the first instance), held that after the passing of the 23 & 24 Vict. c. 38, the trustees were justified in retaining the bank stock and East India stock, and investing other moneys in like stocks, until a suitable investment in land could be found, and that the tenant for life was entitled to the whole income from them subsequent to the passing of the last-named act : but that for the period between the death of the testator and the passing of that act, the tenant for life was entitled only to such income as she would have received if the stocks had been converted at the testator's death, and invested in consols, the 32nd section of the 22 & 23 Vict. c. 35, being made retrospective for the purpose of making it applicable to instruments which would not otherwise have been included in it, but not for the purpose of altering rights which had already accrued.

Retention of
testator's
India and
bank stock.

22 & 23 Vict.
c. 35.

23 & 24 Vict.
c. 38.

22 & 23 Vict.
c. 35, s. 32.

For cases in which the Court has refused or Funds under

control of
Court.

sanctioned investments in East India or bank stocks of funds under its control, see *post*, p. 202 *et seq.*

Application
of enabling
acts, where
consent re-
quired.

Referring to the question whether the acts enlarging the powers of trustees as to investment apply where the consent of the tenant for life is required to the exercise of the powers of invest-

8th ed. p. 311.

ment, Mr. Lewin conceives "that the effect of the acts is to authorize trustees to invest on the extended securities, provided the investments be accompanied with all the conditions required for investment upon the securities specified in the settlement."

23 Ch. D. 750.

In *Re Mackenzie's Trusts*, the testator left 200,000*l.*

Settled Land
Act (45 & 46
Vict. c. 38).

to trustees to lay out the same in the purchase of estates to be settled in strict settlement, with a direction, until a proper purchase should be found, to invest the legacy in government or real securities, but not in any other mode of investment. The beneficiaries, being desirous that the money should not be laid out in the purchase of estates, requested the trustees to invest the money in debenture stock as mentioned in sect. 21 of the Settled Land Act, 1882. The trustees presented a petition asking for the advice of the Court on the point. It was argued that the tenants for life could immediately on a purchase of land being made by the trustees, effect their object

Settled Land
Act, 1882,
s. 21.

Petition for
advice.

by selling the land and investing the proceeds as desired. Mr. Justice Chitty said: "I am of opinion that the trustees may make the required investment, as it is absurd to suppose that that could not now be done which a tenant for life could without question do after an estate had been purchased, by selling the estate and investing the moneys arising from the sale as asked for by this petition."

Other investments (not being real securities) open to trustees are the following:—

Investments
open to
trustees.

- (a) By 30 & 31 Vict. c. 132, s. 2, it is enacted 30 & 31 Vict.
c. 132. that it shall be lawful for any trustee, executor or administrator to invest any trust fund in his possession or under his control in any securities, the interest of which is or shall be guaranteed by parliament.
- (b) By 34 & 35 Vict. c. 47, s. 13, it is enacted 34 & 35 Vict.
c. 47. that trustees empowered to invest in the public funds or other government securities may, unless forbidden by the instrument under which they act, whether prior in date to the act or not, invest in consolidated stock created by the Metropolitan Board of Works.
- (c) By 42 & 43 Vict. c. cccv. s. 37, trustees 42 & 43 Vict.
c. cccv. having power to invest in the stock or

THE INVESTMENT OF TRUST FUNDS.

shares of any Indian railway, the interest on which is guaranteed by the Secretary of State, may invest in the purchase of annuities of the class thereby authorized to be created.

31 & 32 Vict.
c. 109.

(d) By 31 & 32 Vict. c. 109, s. 9, provision is made for the investment by Church trustees incorporated under that act of any funds in their hands.

34 Vict. c. 27.

(e) By 34 Vict. c. 27, it was enacted that where power had been given before the passing of that act, or should thereafter be given, to trustees to invest on the mortgages or bonds of a railway or other company, such power should, unless the contrary be expressed in the instrument, be deemed to include a power to invest in the debenture stock of a railway or other company: an investment in debenture stock may now be made.

38 & 39 Vict.
c. 83.

(f) By 38 & 39 Vict. c. 83, s. 27, trustees authorized to invest in the debentures or debenture stock of any railway or other company, unless the contrary is expressed in the instrument, are empowered to invest in any nominal debentures or nominal debenture stock issued under that act. The act is known as "The Local Loans

Act, 1875," and a similar power is usually given by local acts to invest in corporation or county stocks issued thereunder.

As to *foreign bonds* it may be observed that ^{Foreign securities.} where a testator directed his personal estate, invested in government or other securities in bonds or shares of whatever nature or kind, to be held in the same or like investments, executors were held justified in retaining in specie Victoria bonds, Brazilian and Russian bonds, English and Indian railway stock and East India stock (*Arnould v. 21 W. R. 155. Grinstead*). And in *Cadett v. Earle* it was held ^{5 Ch. D. 710.} by Sir George Jessel, M. R., that a power given by will to trustees to invest "upon any of the stocks or funds of the government of the United States of America, or of the government of France, or any other foreign government," authorized an investment in New York and Ohio stocks and Georgia bonds.

In a very recent case, *Re Brown*, where ^{a 29 Ch. D. 889.} testator directed his trustees to invest the trust moneys in such mode or modes of investment as they in their *uncontrolled discretion* should think fit, the trustees, before the commencement of the administration action, invested in the bonds of a foreign government, bonds of a colonial railway company, and shares of a bank on which was a further liability. The chief clerk disallowed the

sums expended in the purchase of these bonds and shares: but the late Mr. Justice Pearson allowed the investments. His lordship observed, "The terms of the power are very wide, the trustees have acted *bonâ fide*, and there has been no loss to the trust estate. The securities in question ought to be converted, though the trustees have power to postpone the conversion, but the conversion ought not to be indefinitely postponed."

Personal
security.

7 De G., M.
& G. 563.

Of course where expressly empowered to do so by the instrument creating the trust, a trustee may even lend on personal security: see *Paddon v. Richardson*: but on this subject see further *post*, pp. 124 *et seq.*, and p. 207.

Investment
on mortgages.

MORTGAGES.

1 P. W. 141.

In *Brown v. Litton*, Lord Keeper Harcourt observed that it was his opinion that where an executor put out money without the indemnity of a decree, *if it were on a real security*, and one that at the time there was no ground to suspect, the executor under such circumstances was not liable to answer the loss, and so should account for the interest.

Six-and-thirty years later, Lord Hardwicke, C., in *Knight v. Earl Plymouth*, said, "Suppose a

1 Dick. 120.

trustee having in his hands a considerable sum of money, places it out in the funds, which afterwards sink in their value: *or on a security, at the time apparently good* (which afterwards turns out not to be so), for the benefit of the *cestui que trust*, was there ever an instance of a trustee's being made to answer the actual sum so placed out? I answer, No. If there is no *mala fides*, nothing wilful in the conduct of the trustee, the Court will always favour him."

Fifty-four years later, in the year 1801, *Pocock* ^{5 Ves. jr. 794.} *v. Reddington*, was decided by the Master of the Rolls, Sir Richard Pepper Arden. The question as to investment upon real security is only mentioned incidentally: certain trust funds had been improperly invested; the learned judge, in disposing of the exceptions to the Master's report, said, "Before the Master all this transaction came out. With respect to the exceptions, the Master has very properly considered this, as so much money of the testator's received by the defendant. The rule upon this subject is, that, when an executor or trustee, instead of executing the trust, as he ought, by laying out the property *either in well-secured real estates*, or upon government securities, takes upon himself to dispose of it in another manner, the *cestuis que trust* may call him to an account either way: having an option to

make him replace it, or, if it is for their benefit to affirm his conduct, and take what he has sold it for, they may take that, and charge him with 5 per cent. interest; or if he has made more they may charge him with that."

These cases seem to show that these learned judges considered a trustee justified in investing trust funds upon mortgage of real estate. As regards the investment of funds in Court, or subject to the control of the Court, a different rule seems to have obtained, see *post*, pp. 204 *et seq.* But at a later period (1855) the idea that a trustee might properly invest trust funds in his hands upon mortgage, does not seem to have commended itself to the Court; for in *Raby v. Ridehalgh* we find the following remarks in the judgment of Lord Justice Turner: "The first question which arises upon this appeal is, whether under the trust of this will [there were no powers or directions for the investment of the personal estate] the trustees were justified in laying out the trust money upon mortgage at all. That is a question of some difficulty, and is one upon which I desire to give no conclusive opinion. I am not disposed to hold out any encouragement whatever to the notion that a trustee, in the absence of any power for that purpose, is entitled to lay out the trust fund upon mortgage. I desire to be

7 De G., M.
& G. 104.

understood as not giving any sanction to that notion."

Whatever may have been the rule of the Court on the subject when *Raby v. Ridehalgh* was decided (1855), the statute 22 & 23 Vict. c. 35, which statute received the royal assent on the 13th August, 1859, settled the question. By the 32nd section of that act, set out at length on p. 71, *ante*, it was, as we have already seen, made lawful for a trustee, when not expressly forbidden by the instrument creating his trust, to invest the trust funds on (among other investments) "real securities in any part of the United Kingdom."

It seems doubtful, even under the wide expression used in this section, "any part of the United Kingdom," whether a trustee should lend trust money upon the security of real estate in Scotland: at all events, in *In re Miles's Will*, Sir John Romilly, without actually deciding the point, observed, "The investment proposed (*i. e.*, the investment of 10,000*l.* on the security of real estate in Scotland of abundant value) is not one which I, as a trustee, would adopt."

On the 23rd July, 1860, the statute 23 & 24 Vict. c. 38, received the royal assent: by virtue of section 11 of this act, and the existing order made in pursuance of section 10 of the same statute, trustees, as we have already seen, p. 74,

7 De G., M.
& G. 104.
22 & 23 Vict.
c. 35.

5 Jur., N. S.
1236.

23 & 24 Vict.
c. 38.

Ord. XXII.
r. 17.

ante, having power to invest trust moneys on government securities, may invest the same on (among other investments) "mortgage of freehold and copyhold estates respectively in England and Wales."

Copyholds. In lending trust moneys on copyholds, as a real security, the trustees should take care that they are of adequate value, and should not rely on the mere covenant to surrender, but should procure an actual surrender.

Lewin, 8th ed.
p. 328.

33 & 34 Vict.
c. 34.

Corporations
and trustees
for charitable
or public pur-
poses.

By the statute 33 & 34 Vict. c. 34, which received the royal assent on the 1st August, 1870, it is made lawful for corporations and trustees in the United Kingdom holding moneys in trust for any public or charitable purpose to invest the same on real securities without infringing the laws relating to mortmain. And by the 2nd section of this act it is provided, that in every case in which the equity of redemption of the premises comprised in any such security becomes liable to foreclosure, the same shall be held in trust for sale and conversion, and shall be sold, and if a decree is made in a suit to redeem or enforce such security, such decree shall direct a sale (in default of redemption) and not a foreclosure of such premises.

It may be observed in reference to the interpretation of the words "real security" in this act (sect. 3), that such words are to "include all mort-

gages or charges, legal or equitable, of or upon lands or hereditaments of any tenure, or of or upon any estate or interest therein, or any charge or encumbrance thereon."

Where trustees are expressly empowered to invest on real as well as government security, and there is a power to vary securities, the trustees may safely sell the government securities, and invest the proceeds on mortgage.

Where trustees empowered to invest on real securities.

In lending upon mortgage, the trustees must see carefully as to the value of the proposed security: and for this purpose they should have a valuation made for themselves by a valuer selected by themselves. The fact of a valuation having been previously made by a surveyor will not exonerate them if the security prove deficient. In *Bell v. Turner* [which is not, except on a small point of practice, reported in the Law Reports], the trustees in October, 1869, lent 7,000*l.*, part of a trust fund, to a mortgagor upon the security of a freehold property situate at Hartford. A previous valuation by a surveyor put the value of the property at 11,375*l.*: but this had been made upon the basis of the land being let for building purposes: the house, shrubbery and gardens being valued only at 5,000*l.* In October, 1870, the trustees offered the property for sale: there were no biddings. Since March, 1871, the property was

Duties of trustees lending on mortgage. As to valuations.

W. N. 1874, p. 113.

17 Eq. 439.

unoccupied, and 50*l.* per annum was required to keep it from going entirely to ruin. Vice-Chancellor Hall, in May, 1874, said the valuations were based upon very insufficient data: sufficient inquiries had not been made: and the trustees, not having discharged the duty cast upon them of making a proper investigation before they accepted the security, must be held responsible for any loss that might accrue: accounts and inquiries were accordingly directed.

Nor, as we have seen, (*ante*, p. 38,) can trustees rely upon a valuation made by a surveyor employed by the mortgagor. In *Ingle v. Partridge* (No. 2), trustees in 1857 lent 8,000*l.* on mortgage of freehold property at Llanon in Carmarthenshire, proceeding solely on a valuation made the previous year by a surveyor employed by the mortgagor to value the estate. He had valued it at 12,684*l.* The property turned out a very inadequate security for the 8,000*l.* The Master of the Rolls said, "A trustee cannot with propriety lend trust money upon mortgage upon a valuation made by or on behalf of the mortgagor. If he does, and the valuer has *bonâ fide* valued the property at double its value, the trustee must take the consequences: he ought to have employed a valuer on his own behalf to see to it." 34 Beav. 411.

L. R., 7 Ch. App. 719. In *Budge v. Gummow*, the trustees were, on

appeal, charged with loss occasioned by an investment of trust funds on insufficient security. The head-note of the report states: "The property was a hotel in the country, and the trustees had sent down a London surveyor who valued the hotel, including therein the licence, at nearly double the sum to be advanced. The hotel turned out to be worth much less than the sum advanced. The trustees gave no further account of the circumstances under which the advance was made." The licence was valued at 800%. Lord Justice James said, "It appears to me that that report is one upon which no sensible or prudent man would ever lend such a sum as 1,400%. The value of the hotel licence was thrown in, but how could a land surveyor, who was a stranger to the place, estimate the value of the licence? The trustees ought to have ascertained, as they might easily have done, that the hotel was but recently opened, and that the licence could have no such value."

In *Fry v. Tapson*, as we have already seen, (*ante*, 28 Ch. D. 268. p. 40), it was held that the trustees should exercise their own judgment in the selection of the valuer, and not leave the choice to their solicitors.

The title of the mortgagor is also a subject to which trustees, about to advance trust moneys on mortgage, should give their attention.

Selection of
valuer.

Mortgagor's
title.

L. R., 11 Eq. 74. The head-note to *Hopgood v. Parkin* is as follows:—

“A trustee is liable for the loss of a trust fund occasioned by his solicitor having neglected to take proper precautions on the occasion of the investment of the fund on mortgage.

“Whether the loss falls on the trustee, if occasioned by a fraud practised on him, *quære*.”

The trustees in this case, as appears from the judgment of Lord Romilly, M. R., advanced trust money on a property sufficient to cover the mortgage, if it were the first mortgage: the fact of the existence of a prior mortgage was carefully concealed from them. “Does the loss fall on them, or on their *cestuis que trust*?” That was the question which the learned judge asked himself. In his judgment he makes the following observations at p. 78 of the report:—

L. R., 11 Eq. 78. “First, it is material to consider the course pursued by the solicitor of the trustees. It is true that his conduct is not theirs; but he is appointed by them, he is their agent for the management of the affairs of the trust, and if he misconducts himself through ignorance or negligence, or wilfully, he is answerable to the trustees, and they cannot, in my opinion, throw any of the loss thereby occasioned on their *cestuis que trust*.” And farther on in the judgment his lordship said,

that the trustees are bound to employ competent persons, and that if they do not the loss must fall on the trustees: and the trustees were held liable.

This decision, it should be observed, was appealed against, but a compromise was effected with the sanction of the Lords Justices on behalf of infant plaintiffs, and the representatives of a deceased trustee.

Whether, since the decision in *Speight v. Gaunt*,^{22 Ch. D. 727; 9 App. Cas. 1.} the judgment of Lord Romilly, in *Hopgood v. L. R., 11 Eq. 74.* *Parkin*, could be supported, seems doubtful. If it is the ordinary business of a solicitor to investigate the title, and if a trustee, like any ordinary prudent man of business, conducting his own business, is justified in employing a solicitor to perform this task, then, looking at *Speight v. Gaunt*, it seems difficult to say that the trustee "acting by other hands conformably to the common usage of mankind" could be held liable for the default of the solicitor,—his agent for the purpose of investigating the title.

It was possibly to this class of cases that Sir George Jessel, M. R., referred in *Speight v. Gaunt*,^{22 Ch. D. at p. 746.} when he spoke of older cases in which a view different to that taken by modern judges had been taken, and which "would now be repudiated with indignation." Lord Justice Lindley in terms questioned it. His lordship said, "That case"^{22 Ch. D. at p. 761.}

(*Hopgood v. Parkin*) certainly goes much further than I should have thought right:" and then pointed out that it was appealed, and that a compromise was sanctioned by the Court of Appeal.

In the year after *Hopgood v. Parkin* was decided (1870), Lord Romilly, M. R., had before him the case of *Sutton v. Wilders*, in which case he held a trustee liable for the loss of a trust fund caused by his solicitor having committed a fraud on the occasion of the trust fund being invested on mortgage.

L. R., 11 Eq. 74.
51 L. T.,
N. S. 692. *Hopgood v. Parkin* was cited in the recent case of *Re Pearson, Oxley v. Scarth*, which was decided by the late Mr. Justice Pearson on the 24th June, 1884: the head-note states as follows:—"A trustee advanced trust moneys to a brick-building firm upon the security of a first mortgage of their premises, freehold and leasehold, and some of the plant. In so doing he acted upon the advice of his solicitor, and upon a favourable report and valuation made by a respectable firm of architects and surveyors. A bank of good standing, moreover, consented to postpone a charge of theirs to his mortgage.

"The mortgagors failed three years afterwards, whereby their lease of that part of the property upon which was most of the clay and shale necessary for the carrying on of the business,

became forfeited. The remainder of the property proved unsaleable, and rapidly went to ruin.

"An action was subsequently brought by the *cestuis que trust* to make the trustee liable for the loss sustained by them, and it appeared that the report and valuation proceeded, *ex facie*, in some respects upon faulty principles.

"Held, nevertheless, applying the rule stated in *Godfrey v. Faulkner* (48 L. T. Rep. N. S. 853 ; 23 Ch. Div. 483), that the trustee had acted as a prudent man would have acted in dealing with his own property, and was therefore not liable."

Though *Hopgood v. Parkin* was referred to in L. R., 11 Eq. 74. this case, as above mentioned, Mr. Justice Pearson, did not discuss it in his judgment ; but in the judgment, at p. 694, this passage occurs, "for ^{51 L. T.,} trusting his solicitors and valuers no fault can be ^{N. S. 694.} found with him (the defendant trustee), if that were all ; but it is said that when he knew what the property was, as he did, and when the valuation came and was read, his own ordinary sense and intelligence ought to have told him that the security was not a proper or sufficient one." Towards the close of his judgment, Mr. Justice Pearson said, "I think it would be a bad precedent if, when a trustee has taken the same pains with regard to an investment of trust property as if it were his own, being carefully advised by

persons who are in no way supposed to have been acting fraudulently, or wilfully leading him into error, without having shut his eyes to anything which he ought to have seen—if, in such a case, because under circumstances which occur the security turns out bad, he were to be held responsible for the loss.”

It may be mentioned here, that in the later case 32 Ch. D. 196. of *Whiteley v. Learoyd* (see *ante*, p. 55), Vice-Chancellor Bacon declined to follow the decision in 51 L. T., N. S. 694. *Re Pearson*, so far as the last-mentioned case can be said to decide that a power to trustees to invest on “real securities,” authorizes an investment on freehold property, such as brickworks, dependent for its value on a trade carried on thereon. But see the same case (*Whiteley v. Learoyd*), in the Court of Appeal, where Cotton, L. J., said that brickfields were real property, and therefore within the power of investment.

W. N. 1886,
p. 148.

Limit of
advance.
5th ed. p. 328.

The rule as to the limit of advance is thus stated in “Coote’s Law of Mortgage,”—“Under a power to invest on real securities, the sum advanced may be to the amount of two-thirds of the value of the property, if of a permanent value (as freehold agricultural land), but not more than one-half, if it consists of houses and buildings, and much less if of buildings used in trade.”

1 My. & Cr. 8. *Stickney v. Sewell*, a leading authority on this

part of our subject, was decided in 1835 by the Master of the Rolls, Sir C. C. Pepys. In that case, the trustees Sewell and Woollsey were empowered by the will to lend the trust moneys "on government, real or personal security." The will contained a declaration that the trustees "should not be answerable or anywise accountable for any loss which might happen of any of the moneys thereinbefore directed to be placed out at interest as aforesaid, so as such loss happened without their wilful default; but such loss should be borne by the person or persons respectively entitled to such moneys; nor should they be answerable or accountable for any more of his moneys or estate than should come into their hands, nor for the acts, receipts or payments of each other, but each of them for his own acts and payments only." Four years after the testator's death, Sewell lent to his co-trustee, Woollsey and his (Woollsey's) partner, 3,000*l.*, part of the trust estate, on mortgage of certain freeholds and copyholds belonging to them respectively. Sixteen years after the date of the mortgage deeds, Woollsey and his partner were made bankrupts. On a sale of the mortgaged premises there was a deficiency of upwards of 1,200*l.* One part of the mortgaged property consisted of house, garden, watermill, granaries, windmill, and arable and

*Stickney v.
Sewell.*

*Stickney v.
Sewell.*

meadow land; the other part of a dwelling-house, garden and appurtenances situate in a large town.

By the order on further directions, the Master was directed to inquire whether the 3,000*l.* invested on the securities above mentioned was advanced and properly invested pursuant to the directions in the will, and whether any and what part of the 3,000*l.* had been lost in consequence of such investment. Affidavits were filed as to the value of the property at the date of the mortgage, with a view to showing that it was then of such a value as to afford an ample security. The defendant's evidence went to show that at such date the whole of the mortgaged property was worth from 4,200*l.* to 4,700*l.*

The Master reported that the 3,000*l.* invested as aforesaid was not advanced and properly invested pursuant to the directions in the testator's will, and he found the amount which had been lost in consequence of the investment.

Exceptions were taken to this report, and in overruling them the Master of the Rolls said, "The result being that trust money is lost, the burthen of proof of sufficient value lies upon the executors. To advance two-thirds, is admitted to be within the rule of ordinary prudence; but that is with reference to property of a permanent value, as freehold land. The same rule does not apply

to property in houses, which fluctuates in value, *Stickney v. Sewell.* and is always deteriorating."

Referring to the statement of one of the witnesses, that the value had been to some extent diminished, because while there was only one other windmill in the same part of the country when the loan was made, there were three others at the date of the sale, the Master of the Rolls said, "You cannot say that that is a proper investment which derives its value from the accidental absence of competition in trade."

In very recent cases, as we have already seen, the rule as above stated has been approved by judges of the Chancery Division. In *Fry v. Tapson*, one branch of the rule was referred to with approbation by Mr. Justice Kay: his lordship said, that the facts in that case "showed strongly the wisdom of the general rule that not more than one-half the estimated value should be lent by trustees upon house property."

The observations of Vice-Chancellor Bacon in *Godfrey v. Faulkner* as to the other branch of the rule—the advance of two-thirds on freehold lands—have already been referred to (*ante*, p. 45); but the rule itself and the remarks of the Vice-Chancellor have been commented upon in the later case of *Re Pearson* by Mr. Justice Pearson; that learned judge said, "I incline to agree with Bacon,"

51 L. T.,
N. S. 692.

V.-C., in his opinion expressed in *Re Godfrey*, 23 Ch. D. 483. *Godfrey v. Faulkner*, that in considering questions as to a trustee's liability you are to see whether he has acted with ordinary caution and prudence, in the way in which an ordinary cautious and prudent man would act. I do not desire to depart from that rule, nor to say that wherever, in a case of a mortgage, an ordinary person would advance more than the practice of the Court would permit, a trustee also is to be at liberty to exceed the limit. But, where the usual limit has not been exceeded, then, when you have to consider whether or not the trustee is liable, the Vice-Chancellor's rule holds good."

3 Drew. 9.
Trade
buildings.

In *Stretton v. Ashmall* a small trust fund was invested by trustees, who had power to invest on such securities as they should approve, upon a mortgage of trade buildings: it was held that, notwithstanding the wide terms of the investment clause, the trustees were bound to exercise a careful discretion in selecting a security, as to value; and that, not having ascertained that the trade buildings were at least worth twice the money invested, a breach of trust had been committed. "It has been decided in many cases," observed Vice-Chancellor Kindersley in his judgment, "that the duty of trustees is this, not as a fixed rule liable to no variation, but as a rule of ordinary

discretion, not to lend more than two-thirds of the actual apparent value, even when the property is land of an apparently fixed and permanent value: but if it is property of a fluctuating character, they ought not to lend upon property of less than twice the amount lent." Another important observation in the same judgment is the following: "I ought to observe upon the question of breach of trust, that in all cases where a trustee lends on property of an irregular description, it lies on him to show that the property was sufficient: the onus is not on the *cestui que trust* to show that it was insufficient." Onus, where fund is lent on irregular description of property.

It seems that a power to invest on the security of freeholds and copyholds authorizes an investment on freehold ground rents reserved out of houses. In *Vickery v. Evans* such an investment was objected to, but the Master of the Rolls was of opinion "that the freehold ground rents were a sufficient security; the value of the houses was really included in it, as the landlord might enter if the ground rent were not paid." Freehold ground rents Lewin, 8th ed. p. 325. 3 N. R. 286.

In *Farrar v. Barraclough*, Vice-Chancellor Stuart said, "An attempt has also been made to charge as a breach of trust, that the defendant took the mortgage without having had given to him a power of sale; but I never heard that that amounted to a breach of trust. If such a breach" 2 Sm. & G. 231. Absence of power of sale.

of trust be the sole object of this suit, it is not sustainable on that ground."

C. A. 1881
and 1882.

Having regard to the provisions of the recent Conveyancing Acts, it is perhaps hardly likely that in the future a similar case will arise.

Monies should
not be tied
up.

33 Beav. 376.

Trustees investing trust monies upon mortgage should not tie up the money so that it cannot be called in before a certain day; if the tenant for life should happen to die before the day named, the trustees would have to find the money. This question was before the Court in the year 1863 in *Vickery v. Evans*: the Master of the Rolls said, "This point was also referred to:—that the money was lent on a condition that it should not be called in for five years, and as the mortgage deed is dated October, 1862, the plaintiff might be kept out of his money if the tenant for life were to die before the five years. I think the plaintiff would, in that event, be entitled either to have a transfer of the mortgage, or to have the mortgage sold and the deficiency made up by the trustees, because he is entitled to payment at once." There was also, in this case, before the Court the question of the propriety of the investment, as we have already seen (*ante*, p. 99); on this point the Court was in the trustees' favour, and the last paragraph in the judgment of the Master of the Rolls is as follows: "I am of opinion, therefore, that this is not an

improper security, *although the trustees may be liable to the plaintiff to make good the deficiency in the event of the sale of the mortgage within five years*, and consequently that the plaintiff is not entitled to say that they must make another investment. I do not think it proper to dismiss the bill, but I will declare this to be a proper investment with liberty to apply."

Of course after a decree to account, trustees ought not to lend money on mortgage without an application to the Court. In *Widdowson v. Duck*, 2 Mer. 494.

Lord Eldon said, "The rule is never to permit a trustee or executor, after a decree, to lay out money on mortgage, without a previous application to the Court." And see the observations of Sir George Jessel, M. R., in *Bethell v. Abraham*, L. R., 17 Eq. 24. *post*, p. 212 *et seq.*

Trustees with a direction to invest trust money on a mortgage may appropriate one of the testator's mortgages in payment of the legacy; but they must remember that they are bound to ascertain its sufficiency—as though they were themselves selecting a new security. In *Ames v. Parkinson*, 7 Beav. 379. trustees were directed to invest a certain sum (a legacy) on mortgage of freeholds or copyholds, or on government securities: they appropriated three mortgages of freeholds of which their testator had died possessed to answer the legacy: one of these

Duty of trustee after decree.

Appropriation of testator's mortgage.

*Ames v.
Parkinson.*

appeared to be an insufficient security. It was argued against the trustees that they had no right to appropriate these mortgages of their testator in discharge of the legacy, and that as regarded the insufficient mortgage they had not exercised a proper discretion. The contrary was maintained on behalf of the trustees. In his judgment Lord Langdale said, "It has been argued that there being proper mortgage securities belonging to the testator, the executors were under no obligation to sell or realize those securities, and afterwards invest the produce again in the same sort of securities. I think there is great weight in the argument. . . . I do not think it was necessary for them to call in good securities, and then procure others of the same nature to answer the legacy, and I do not understand there was anything to preclude the executors from appropriating proper securities belonging to the testator to the payment of this legacy: but the appropriation being an act of their own, was done on their own responsibility, and it was therefore incumbent on them to see that the securities so appropriated were of sufficient value. It was an exercise of discretion on the part of the executors when they, by appropriation, invested the money on real security."

In the result the trustees were, on the question of discretion, held liable.

In *Ames v. Parkinson* it was asked on behalf of *Ames v. Parkinson.*
 the plaintiffs that they might have the benefit *7 Beav. 379.*
 of the money, as if it had been laid out in the *Estimate of*
 funds at the end of a year from the testator's *loss where*
 death. Lord Langdale said, "I think they are *trustees have*
 not entitled to this, because the trustees had a *a discretion.*
 right to exercise a discretion whether the legacy
 should be invested on real securities or in the
 funds. They exercised that right of selection:
 and are only to be charged with the sum which
 may be lost."

Many years previously to the last quoted decision, Sir John Leach had ruled in *Marsh v. 6 Madd. 295.*
Hunter, that if trustees may invest in stock or on
 real security, and they lend on personal security,
 and thereby the money is lost, they shall be
 answerable not for the amount of stock which
 might have been purchased, but for the principal
 money lost; because if real security had been
 taken, the principal money only would have been
 forthcoming to the trust, and the want of real
 security is all that is imputable to the trustee.

Marsh v. Hunter was followed by Sir James *6 Madd. 295.*
 Wigram and other judges, but the opposite view
 was taken by Lord Gifford in *Hockley v. Bantock, 1 Russ. 141.*
 where an inquiry was directed as to the price
 of 3l. per cents. at the times when the monies
 ought to have been invested: and Lord Gif-

ford's view was adopted in some cases by Lord Langdale.

1 De G., M.
& G. 247.

In this "irreconcilable conflict of authority" the Court of Appeal decided in *Robinson v. Robinson*, that where a testator directs his trustees to invest trust monies in parliamentary stocks or funds or on real securities, and they omit so to invest it, the *cestuis que trust* have not the option of charging them with the money which would have been produced if it had been invested in the funds, but are only entitled to have the trust monies replaced with interest at 4l. per cent.

Real securities in Ireland.

4 & 5 Will. 4,
c. 29.

By the statute 4 & 5 Will. 4, c. 29 (which received the royal assent on the 25th July, 1834), after a recital by which it appeared that "manifest improvement had taken place in the condition and security of landed property in Ireland, which it was desirable to encourage and advance," it is enacted that it shall be lawful (from and after the passing of the act) for trustees who under trusts then, or thereafter to be, created, are authorized to lend money at interest on real securities in England, Wales or Great Britain, to lend the same at interest on real securities in Ireland in the same manner in all respects as if such investment had been expressly authorized in and by the trust: and that such trustees shall not on account of so lending money on real securities

in Ireland, be considered in a court of equity guilty of any breach of trust, or held accountable further or otherwise than if the money had been laid out by them on real securities in England, Wales or Great Britain.

This act contains special provisions (1) to meet the cases of loans in which minors are interested, and (2) to enable the English courts to enforce payment of monies lent on real securities in Ireland "as if the said lands and hereditaments were situate in England or Wales."

As to the construction put upon this act by the Court in regard to funds in Court, see *Stuart v. Stuart*, *post*, p. 206. Construction by the Court.
3 Beav. 430.

In *Ex parte French*, where the fund was not in Court, the Vice-Chancellor of England, on a petition by the tenant for life, directed an inquiry as to whether it would be for the benefit of the parties interested that the trust funds should be invested at interest on real securities in Ireland. 7 Sim. 510.

See also *Ex parte Pawlett*, where Lord Cottenham, C., said, that "since the act of parliament, England and Wales must for this purpose be taken to include Ireland." 1 Ph. 570.
4 & 5 Will. 4,
c. 29.

In the year 1847 was passed "An Act to facilitate the temporary investment of trust monies in the improvement of landed property in Ireland." 10 & 11 Vict.
c. 46.
Ireland (S.E.)

This act contains provisions enabling trustees having in hand monies produced by the sale of settled lands in Ireland to petition the Court of Chancery in Ireland for permission to lay out such monies in improvements on other settled lands: or to lay out monies belonging to persons under disability in the permanent improvement of the estates of such persons: and enables the Court, in proper cases, to give effect to such petition.

22 & 23 Vict.
c. 35.

It will be remembered that by sect. 32 of Lord St. Leonards' Act, trustees, not expressly forbidden, may invest the trust fund on real securities in any part of the United Kingdom.

Trustees must
not lend to
one of them-
selves.

Where trustees have power to lend on mortgage, they must not lend to one of themselves, because all should exercise an impartial judgment as to the sufficiency of the security. In *Stickney*

1 M. & Cr. 8.

v. Sewell the Master of the Rolls observed, that the testator intended that the estate should have the benefit of the executors' discretion: "but," said his Honour, "they lend to themselves:" and this is probably one of the many grounds upon every one of which the judge, in that case, declared that the defendant trustees would be liable.

Power to lend
to three does
not authorize
loan to two.

Nor should trustees having a power to lend to three on a mortgage of their joint interest in

certain premises, lend to two of them : in *Fowler v. Reynal*, the trustees of an ante-nuptial settlement lent the whole of the trust funds to three persons, who afterwards became proprietors of and partners in the Vauxhall Gardens, but no written security was taken by the trustees at the time of the loan. One of the three proprietors subsequently retired from the partnership. Some months afterwards the trustees obtained a covenant from the two remaining proprietors to surrender the Vauxhall Gardens by way of mortgage. This mortgage eventually proved a wholly inadequate security for the trust funds, and a suit was instituted to compel the trustees to make it good. The Vice-Chancellor Knight-Bruce held that the trustees must be considered, in having made the advance without security, and in having afterwards accepted the covenant of two only of the three joint debtors, to have misapplied the trust fund, and that they had subjected themselves to the liability of replacing it.

This decision was appealed from, and the Lord Chancellor Truro affirmed it.

In *Robinson v. Robinson*, the testator directed the conversion of his residuary personal estate into money, and the investment of the money "in or upon any of the parliamentary stocks or funds or on real securities at interest." Part of the

3 Mac. & G.
500.

1 De G., M.
& G. 247.
Turnpike
bonds.

*Robinson v.
Robinson.*
Turnpike
bonds.

Lord Lang-
dale, M.R.

Court of
Appeal.

personal estate consisted at the time of the testator's death of 6,000*l.* turnpike bonds due from the trustees of the Surrey and Sussex Roads. 1,500*l.*, part of this sum of 6,000*l.*, was paid off by the road trustees to the executors and was duly applied by them: the remaining 4,500*l.* they permitted to continue on the security of the bonds, paying the interest thereon to the tenant for life. The cause came before Lord Langdale (fourteen years after the death of the testator), who held that the turnpike bonds ought to have been sold, and the proceeds invested in 3*l.* per cents.: and that the executors were liable for the amount of stock which might have been thus purchased. From this judgment the executors appealed. In delivering the judgment of the Court of Appeal, Lord Cranworth, L. J., after pointing out that the order appealed from put the turnpike bonds on the same footing as the bank stock and other items of the residuary personal estate, proceeded as follows: "but we think that these road bonds, as they have been called, are real securities, on which, by the terms of the will, the executors were justified in leaving the testator's assets invested. There can be no doubt that they are real securities, indeed they are so perhaps even more emphatically than an ordinary mortgage." And the Court held that the executors were justified in leaving these

securities as they found them. Further on, however, in Lord Cranworth's judgment occurs the following passage: "We desire not to be understood as giving any opinion on the point (not arising in the present case), whether the executors would have been justified in laying out any part of the general assets on turnpike securities similar to those now in question."

Quere,
whether a
proper invest-
ment to be
made by
trustee.

In the recent case of *Cavendish v. Cavendish*, the testator's will contained a specific bequest of all monies, stocks, funds, shares, and other securities "except mortgages on real and leasehold securities:" following *Robinson v. Robinson*, Mr. Justice North held that mortgages of turnpike road tolls, and mortgages of turnpike road tolls and toll-houses, were mortgages on real security, and came within the exception in the bequest.

24 Ch. D.
685.

1 De G., M.
& G. 247.

Where trustees are authorized to invest in the mortgages or bonds of a railway or other company, they may (under the provisions of "The Debenture Stock Act, 1871"), unless expressly forbidden, invest in the debenture stock, by means of which such company is empowered to raise the money which it may raise on mortgage or bond.

Railway
mortgages.

34 Vict. c. 27,
ante, p. 80.

In *Mant v. Leith*, a trustee with power to invest "in any of the public stocks or funds of this kingdom, or on real securities," had lent 3,700*l.*, part of the trust funds, to the Great Northern

15 Beav. 524.

Railway Company, who assigned the undertaking, &c., by way of mortgage to secure the same. It was urged in argument that this was not such a security as the Court would sanction in the case of trust funds, and that it was not "a real security," but one dependent on the success of a mere commercial speculation. Sir John Romilly, M. R., in giving judgment, said, "I am of opinion that this was not a proper investment, or such a one as, under the power contained in the settlement, the trustee ought to have made. Assuming it to be a real security, which I am disposed to think, though I express no opinion on the point, I am of opinion that it is not sufficient for a trustee to show that this is an investment on real security. There are various other things to be considered, such as the nature of the property, and the different conditions which may affect its value."

29 Beav. 107. In *Harris v. Harris* (No. 1), where trustees empowered to invest upon any of the parliamentary stocks or public funds of Great Britain, or upon government or real securities in England or Wales, or upon security of the funds of any company incorporated by act of parliament, invested part of the trust funds in Great Northern Preference shares at 5% per cent., redeemable at 10% per cent. premium, the same learned judge observed,

“There can be no question, in my opinion, but that it was an improper investment. It is not an investment upon the security of the funds of the railway company, as debentures would be, but it is in fact embarking the trust funds in the speculation of the railway. It may be thought by some persons that no great amount of risk is incurred thereby, but it is clear that, under the terms of this settlement, it was an improper sort of investment, the interest being only secured on the profits of the concern.”

Even where the power to invest is given to the trustees in such wide terms as to lend “*on such securities as they may approve*,” they are bound to exercise a sound discretion as to value; and if they lend on irregular securities (as trade buildings) the onus lies on them, as we have seen in *Stretton* 3 Drew. 9. v. *Ashmall*, ante, p. 99, to show the sufficiency of the security: and see *post*, p. 130 *et seq.*

As to lending trust monies on second mortgages, equitable mortgages, sub-mortgages, stock mortgages, contributory mortgages, or mortgages of leaseholds, see *post*, p. 136 *et seq.*

It is provided by the Improvement of Land Act, 1864 (sect. 60), that “all trustees, directors, and other persons, who may be directed or authorized to invest any money on real security, shall (unless the contrary be provided by the instru-

Improvement
of Land Act
(27 & 28 Vict.
c. 114).

ment directing or authorizing such investment) have power at their discretion to invest money in charges under the act, or on mortgages thereof." And by the following section (61) it is provided that, "No charge on land made by any absolute order by virtue of this act shall be deemed such an incumbrance as shall preclude a trustee of money with power to invest the same in the purchase of land, or on mortgage, from investing it in a purchase, or upon a mortgage of the land so charged, unless the terms of his trust or power expressly provide that the land to be so purchased or taken in mortgage be not subject to any prior charge."

Parting with
the money.

3 Sim. 265.

Trustees when investing the trust fund on mortgage cannot safely part with the money except on delivery of the security. In *Hanbury v. Kirkland* it appeared that a sum of stock was settled, on a marriage, for the separate use of the wife for life, remainder for the husband for life, remainder for their children, with power to change the security with the consent of the wife. One of the trustees, in whom the wife and husband chiefly confided, and who, with his partners, acted as their solicitor, informed his co-trustees that he had an opportunity of investing the trust fund in a mortgage at 5 per cent., and, with the consent of the husband and wife, he requested his co-trustees to execute a power of attorney to enable him to

sell the stock. The co-trustees complied without inquiring into the matter. The trustee sold the stock, and absconded. The co-trustees were held liable. Vice-Chancellor Shadwell observed, "The trustees in this case have been guilty of most culpable negligence. It was the duty of the trustees to inquire what was the intended security, and who was to be the mortgagor. But they did not bestow a thought upon the subject . . . and the trustees, without exercising a single act of discretion, execute the power of attorney . . . They took for granted the representation made to them by their co-trustee, who was not their solicitor, but was the solicitor of the wife. I am therefore of opinion that the trustees have been guilty of most culpable negligence; and it is my duty to decree that they do re-invest the stock, and account for the dividends since the last payment, and pay the costs of the suit."

In the later case of *Rowland v. Witherden*, the trustees had sold the stock and committed the proceeds to their own solicitor for investment on mortgage, by whom it was misapplied and lost: Lord Chancellor Truro held that the trustees were liable for a breach of trust, and that the *cestuis que trust* were entitled to relief against both the trustees and the solicitor, and that they might sue either the trustees alone, or the trustees jointly

Hanbury v. Kirkland.

3 Mac. & G.
568.

with the solicitor. "As to the liability of the trustees," observed his lordship, "I entertain no doubt. The short result of the case is, that the trustees, instead of themselves seeing to the investment of the fund, delegated that duty to their solicitor, who misapplied the money. The trustees were bound to satisfy themselves in some other way than by the mere assurances of their solicitor, and by payments made by him as for interest, that the money was really advanced on mortgage. But they did not even require a sight of the mortgage deed, but simply paid the money to their solicitor, and implicitly relied on his integrity, so that, in fact, in place of a mortgage of real estate, their *cestuis que trust* might depend for aught they knew to the contrary, and in fact did depend, upon nothing more than a personal remedy against their solicitor."

Trustees for
purchase.

It is not proposed, in this work, to consider at length the subject of the duties of Trustees for Purchase. The question is an important one: but quite outside that of the usual duties connected with the Investment of Trust Funds, using that phrase in its ordinary meaning: the ultimate trust, where the duty to invest the fund exists, generally being to distribute the trust monies: whereas when an estate is to be purchased, it is usually with a view to its being strictly settled.

It may, however, be stated generally, that if a particular fund be bequeathed to trustees to make a purchase, and they fail to call in the money and carry out the trust, they are liable to compensate their *cestui que trust* for the consequences.

The trust, moreover, is not performed by merely paying the purchase-money and taking a conveyance. Other duties, such as seeing to the value of the estate proposed to be purchased, and investigating the title thereto, &c., are cast upon those who undertake the performance of such a trust.

The matter is treated of at some length in *Lewin, chap. xix. of the 8th edition of Mr. Lewin's well-known work.* ^{xix. (8th ed.)}

Speaking generally, as to permissible investments, it may be useful, in closing this chapter, to make the four following observations: ^{General observations.}

1. In the investment of trust funds, the trustees should never employ the solicitor who acts for the borrower.

In *Waring v. Waring*, Lord Chancellor Blackburne observed on this matter as follows: "The employment of the same professional person, in the ordinary case of vendor and purchaser, is, from the conflicting nature of the duties which each employer has a right to have performed, for obvious reasons highly objectionable. Practically,

3 Ir. Ch. Rep. 331.

and for the most obvious reasons, it is equally, if not more so, for the lender to employ the borrower's solicitor. Though there is not a conflict of rights, there is an opposition of interests, and the solicitor for the borrower must be anxious to remove the very difficulties which it is his duty to discover and suggest. There is, in short, such an inconsistency in the interests of each party, that a common agent of both can hardly do his duty to the one without betraying or neglecting his duty to the other."

2. Trustees, when entertaining the question of investment, should not favour the tenant for life at the expense of the remaindermen.

7 De G., M.
& G. 104.

In *Raby v. Ridehalgh*, personalty was bequeathed to trustees on trusts for tenants for life with executory trusts in remainder, but without directions as to investment.

The trustees, at the instance of the tenants for life, abandoned their original intention of investing in the funds (it must be borne in mind that this case was decided in the year 1855, that is to say, some four or five years before the 22 & 23 Vict. c. 35, was passed), and invested on mortgage so as to obtain an increased income, but it did not appear that the tenants for life approved of the particular securities which were taken, and which proved

insufficient. The trustees were decreed to make good the loss, and the tenants for life and their interests in the trust funds were held liable to recoup to the trustees the amount ordered to be paid by them to the extent of the income received by the tenants for life respectively from the mortgages. Lord Justice Turner, in delivering the judgment of the Court, remarked, "Assuming that a trustee, acting in the ordinary exercise of the discretion belonging to him in that character, could properly make such an investment (*i. e.*, an investment on a mortgage) of the trust fund without any power expressly given to him to do so, it is clear that, in making such an investment, it is his bounden duty to have regard to the rights and interests of all parties concerned, and if it appears that he has made the investment at the instance and for the benefit of one or more of *cestuis que trustent*, without having regard to the interests of the others, and loss has resulted from the investment, that is a breach of trust for which he and his estate must be made responsible."

And in *Harrison v. Thexton* it was held, that ^{4 Jur., N. S. 550.} where trust funds are invested on inadequate security, it is the duty of the trustees, having due regard to the ulterior interests created under the settlement, to insist upon their re-investment, although the tenant for life refused her consent,

which consent was necessary to any change in the investment, and although the security was one expressly authorized by the trust.

So, also, in cases where every change of investment is to be with the consent of the tenant for life, the want of that consent will not fetter the action of the Court, which, if satisfied that the existing security is insufficient, will, independently of any consent, and in order to protect the interests of all the *cestuis que trusts*, require that the money should be called in and be properly invested (per Chatterton, V.-C., in *Costello v. O'Rorke*).

3 Ir. Rep.,
Eq. at p. 184.

And just as the Court (*post*, p. 204) usually directs a conversion into 3l. per cents. where the estate consists of long annuities or other security not of the most permanent character, so trustees, who must follow the practice of the Court, in the absence of special powers, would not be justified in investing trust funds settled on several persons successively upon securities which by the said rule of the Court would be liable to be converted into other securities: see *Howe v. Earl of Dartmouth*.

7 Ves. jr.
137a.

L. R., 18 Eq.
422.

In *Tickner v. Old*, a testator gave his residue to trustees to convert and invest on government or real securities, to pay his widow the income for life, and after her death to distribute the corpus: he also empowered them to continue invested any of his government stocks or real

securities, and directed that his wife should be entitled to the income of his residuary estate from the day of his death. Vice-Chancellor Malins held that the trustees were under the will empowered to retain such government securities only as were of a permanent character: that certain long annuities, which formed part of the estate, ought to have been sold, and the proceeds invested on permanent securities: and that the widow's estate was liable to recoup the testator's estate the amount which would have been produced by the sale of the long annuities, she having received in her lifetime the whole proceeds till they expired.

3. Any conditions annexed to the power to invest, or vary investments, should be observed strictly.

In an early case (*Bateman v. Davis*), it appeared 3 Mad. 98. that power was given to the trustees of a marriage settlement with the written consent of the plaintiff (the wife), if living, to pay and apply a sum of 1,500*l.*, out of a sum of 6,000*l.* bank reduced annuities, for the advancement of the husband. The trustees sold out 1,500*l.* stock, without the written consent of the plaintiff, and paid the same to the husband. Afterwards by deed the plaintiff declared that the sale of the stock and payment to the husband were with her full consent and approbation. The Vice-Chancellor (Sir John

Leach) said that the trustees could not justify their breach of trust by alleging the subsequent approbation of the plaintiff: the actual advance to the husband created a pressure on the judgment of the plaintiff, which gave to her subsequent approbation a very different character from the free consent required by the settlement. The estates of the trustees were ordered to refund the stock, and pay the costs of the suit.

37 L. J., Ch.
(N. S.) 499.

But in *Stevens v. Robertson*, an investment was made without the required consent, and it was held that a *cestui que trust* who, being *sui juris*, had acquiesced in and adopted the investment, could not afterwards make the trustees liable. The facts were shortly as follow:—the trustees were authorized to invest in securities issued by any incorporated public company paying a dividend or guaranteed income, and with the consent in writing of the tenant for life (notwithstanding her coverture) to vary the trust funds and securities; the trustees without consent invested in debentures of a railway which were afterwards paid off, and the money then received was without consent re-invested in the debentures of another line, the dividends being guaranteed by the contractors. The tenant for life and her husband (the plaintiff) joined in signing receipts for dividends from the latter investment till the con-

tractors failed. After the death of the wife the plaintiff received one dividend. The marginal note of the case says, "On a bill filed by him against the trustees of the settlement, to make them liable for a breach of trust.—Held, that the previous consent in writing of the wife was not required to an investment by the trustees; and that he could not now make them liable for a breach of trust." Vice-Chancellor Stuart appears to have arrived at this decision mainly on the grounds that in this case no *previous* consent in writing was required, and that the signing printed receipts for dividends was such a consent to the transposition of the securities as acquitted the trustees of responsibility for a breach of trust with respect to them.

4. Trustees should avoid making any investment which subjects the trust funds to the control of any one of the trustees singly.

In *Lewis v. Nobbs* an authorized investment 8 Ch. D. 591. was made by two trustees in Russian Railway and Egyptian Bonds; but each of the two trustees retained a moiety of the bonds held in trust, and which passed by delivery; and one of the trustees committed a breach of trust; it was held that the other trustee was liable to make good the loss sustained. Vice-Chancellor Hall said that he was of opinion that the trustees were authorized by the

proviso in the will to invest the trust funds in the bonds; "but," continued his lordship, "though a proper investment, I think that the defendant Nobbs did not discharge his duty in allowing his co-trustee to retain possession of one half of the bonds, and the course pursued enabled the co-trustee to improperly deal with them. The duty of the trustees was to make an investment in the names of both, so that the bonds should not be transferable without the action of both, or, as the bonds were transferable by delivery, care should have been taken that there could not be any improper disposition of them. The arrangement made by the defendant Nobbs being improper, he is liable for the illegal dealing with the moiety of the bonds of his co-trustee."

Sect. 1273 f. As stated in Mr. Justice Story's work, the rule is that "Joint trustees are responsible for the acts of each other, in the misapplication of the trust funds, where they have put the fund in the power of one of their number."

31 Beav. 330. So in *Consterdine v. Consterdine*, the Master of the Rolls said that trustees ought not to allow part of the testator's estate to remain on shares, as invested by the testator himself, which, by the rules of the company, could only stand in the name of a single trustee. Though where shares in such a company are specifically bequeathed to

three trustees, they were held justified from the nature of the case in taking the shares in the name of one of themselves.

Nor should a trustee place trust money in a bank payable to either of the co-trustees. The decision of the Lord Chancellor in Ireland in *Kilbee v. Sneyd* is so at variance with the principle of the other cases "that," observes Mr. Lewin, 8th ed. p. 297. "no trustee or executor could be advised to rely upon it in practice." See *Clough v. Bond*. 3 My. & Cr. 490.

CHAPTER IV.

OF INVESTMENTS NOT PERMITTED.

Personal
security.
At p. 926.

Sect. 1274.

As regards a loan of trust funds upon personal security, the rule is thus stated in Spence's Chancery Jurisdiction: "Trustees and executors are not justified in lending any part of the trust funds on personal security, unless expressly authorized so to do. Nor are trustees or executors justified, unless under a clear authority for that purpose, in leaving the trust fund out on personal security." And Mr. Justice Story, writing on the same subject, remarks, "If a trustee should invest trust monies in mere personal securities, however unexceptionable they might seem to be, in case of any loss by the insolvency of the borrower, he would be held responsible; for in all cases of this sort, Courts of Equity require security to be taken on real estate, or on some other thing of permanent value. Nay, it will be at the peril of the trustee, if trust money comes to his hands (such as a debt due from a third person), to suffer it to remain upon the mere personal credit of the debtor, although the tes-

tator, who created the trust, had left it in that very state. The principle is even carried further: and in cases of personal security taken by a trustee, he is made responsible for all deficiencies, and is also chargeable for all profits, if any are made. So that he acquires a double responsibility, although in such cases he may have acted in entire good faith, in the exercise of what he supposed to be a sound discretion."

It may be remarked at the outset that where there is a power to lend on "personal security," it may mean on the security of personal property, or the personal undertaking of the borrower (Lewin 8th ed. p. 317. on Trustees); where the last-mentioned power was given, and trustees lent upon a note of hand, the Court, in *Picard v. Anderson*, allowed the loan, L. R., 13 Eq. 608. but ordered a bond to be taken.

It is true that in *Harden v. Parsons* the Lord 1 Eden, 145. Keeper (Lord Henley) said, "The lending trust money on a note is not a breach of trust without other circumstances *crassæ negligentiae*. That is plain from the case of *Ryder v. Bickersteth*, where a sum of money was left to be placed out on security, with the best interest that could be got. The executor had lent it on a note without interest. Did the Court say that it was a clear breach of trust to lend it on a personal security? No." In *Walker* 2 Sw. 1. v. *Symonds*, Lord Eldon, C., referring to Lord

Henley's judgment in *Harden v. Parsons*, said,
 2 Sw. at p. 62. "The judgment in *Harden v. Parsons* is, in more respects than one, a curious document in the history of trusts as administered by this Court."

Lord Eldon then quoted the passage cited above from that judgment, and then proceeded as follows:—"The fact is that the Court said, yes: declaring that the trustee having placed out the money neither at interest, nor on security, had committed a direct breach of trust in both respects."

Lord North-
 ington over-
 ruled.

The doctrine of Lord Henley (afterwards Earl of Northington, C.), must be considered as clearly overruled, and the rule is established beyond question that the investing of trust money on personal security is a breach of trust.

2 Cox, 1.
 Lord Ken-
 yon's state-
 ment of the
 rule.

In *Holmes v. Dring*, where executors had lent the money of the plaintiff (an infant), on the private security of a bond, Lord Kenyon said, "It was never heard of that a trustee could lend an infant's money on private security. This is a rule that *should be rung in the ears* of every person who acts in the character of trustee, for such an act may very probably be done with the best and honestest intention, yet no rule in a Court of Equity is so well established as this." The fact that the money is lent on the joint security of several obligors will not alter the case. In the case last quoted Lord Kenyon said, "The bond of

2 Cox, 1.

several persons cannot be distinguished from the bond of one person." Nor will the circumstance Testator's conduct not to be followed. that the testator himself was in the habit of lending on personal security to a particular person better the trustee's position, should he continue to lend to that same individual: see *Styles v. 1 Mac. & G. 422.* *Guy.*

Even where trustees were authorized—as in *Langston v. Ollivant*—to place out trust monies on Geo. Cooper, 33. “*real or personal security as should be thought sufficient,*” and the will declared that the trustees Accommodation loan not permitted. should not be answerable for any loss which should happen without their wilful default or neglect, the defendant trustees, who had lent the monies to the husband of the tenant for life on his bond (advancing at the same time and on the same security 600% of their own money) were held liable on the bankruptcy of the husband several years after the advance. Sir William Grant was of opinion that the authority given did not extend to an accommodation, which was what had really taken place.

In Spence's Chancery Jurisdiction, it is stated At p. 926. that an authority to trustees *to lend on such personal security as they shall think sufficient* will not Investment in trade. justify them in lending the trust money to the husband who is in trade, or to any trading concern: and in support of this proposition the

10 Mod. 490. learned author refers to the case of *Cock v. Goodfellow*.

Sect. 1277a. Mr. Justice Story says, that if a trustee loan the trust money to others (*i. e.*, in trade) who know of the breach of trust thus committed, the *cestuis que trust* may follow the money into their hands, but they cannot claim any profits which they may have made beyond legal interest, but are limited to the compensation stipulated by the borrowers, if that is not less than the trustee could have realized in a prudent investment.

6 Jur., N. S. 719. The case of *Stroud v. Gwyer*, is referred to as the author's authority for this proposition.

Investment in trustee's own business. For cases where the trustee has invested the trust fund in his own trade, see *post*, Chap. V. p. 148 *et seq.*

3 Jo. & Lat. 64. In the head-note to *Cummins v. Cummins* (decided in Ireland by Lord Chancellor Sugden), it is stated that though the settlor should authorize the trustees to continue the trust funds upon the personal security of a trading firm, in which he had invested them, yet the trustees are guilty of a breach of trust, if, upon a change taking place in the firm, they permit the fund to remain upon the personal security of the new firm.

1 Y. & Coll. N. R. 617. In *Boss v. Godsall*, the trustees of a marriage settlement were empowered *and required* at any time or times at the request in writing of the wife

to advance part of the trust monies to the husband on the security of his bond.

After the marriage the husband was imprisoned for debt and took the benefit of the Insolvent Debtors' Act. The wife then applied to the trustee for a loan to the husband according to the terms of the settlement. The trustee refused to make the advance. Vice-Chancellor Knight-Bruce held, that such a change had taken place in the circumstances of the husband, as rendered the clause inapplicable to him, and consequently that the trustee was justified in refusing to lend the money.

In *Trafford v. Boehm*, the trust was, until a ^{3 Atk. 440.} proper purchase of lands could be found, to invest the trust money on "government funds or other ^{Stock of private company.} good securities." A large sum was invested by the trustees in the purchase of 7,000*l.* South Sea stock. South Sea stock fell considerably, and a loss was sustained upon the sale thereof. Lord Hardwicke, C., said, that neither South Sea stock nor Bank stock were considered good security, because it depends on the management of the directors and governors, and is subject to losses: "for instance," said his lordship, "it is in the power of the South Sea Company to trade away their whole stock while they keep within the terms of their charter."

It may, therefore, be stated generally that trustees may not invest trust funds upon the stock of any private company.

Expressions insufficient to justify loan on personal security.

There are to be found in some of the cases, in which the rule against lending trust monies on personal security is referred to, certain expressions which, it has been urged, justified loans on personal security by the defendant trustees: but which expressions, in the opinion of the Court, did not justify such advances: it may be useful to glance at two or three of these cases.

5 Ves. 794.

In *Pocock v. Reddington* the trust created by the testator's will was, during the minority of the testator's children, "*to increase and improve*" the residue of the monies, representing rents of freehold estates, receivable under a term of ninety-nine years created by the will, "*by placing the same out at interest as the trustees should see occasion,*" and to convert the residuary personal estate into money "*and place the same out at interest at their discretion.*" After investing certain of the trust monies in the funds from time to time, the sole trustee (one having predeceased the testator) eventually sold large portions of such investments and lent the proceeds of these sales upon personal security: the two persons to whom these advances were made afterwards failed, and the trust monies so advanced were lost. The de-

fendant insisted on his discretionary power under the will. The Master of the Rolls (Sir R. P. Arden) held the trustee liable. His Honor said, "It is not objected that he laid out these several sums (the sums in question) in the funds: but upon further inquiry, it came out that, instead of permitting the property to lie there, he had very imprudently, and, I must say, very improperly, taken upon himself to lend the money of his wards to his own friends, and upon personal security. . . . That is a transaction that it is impossible to permit to pass without animadversion and without reprobating it in the strongest manner."

In *Wilkes v. Steward* the will empowered the defendants (the executor and executrix) to lay out the legacy in the funds "*or on such other good security as they could procure and should think safe*:" the discretionary power given by the testator was relied on by the defendants' counsel as justifying them if (as the fact was) they had laid out the money upon bond. Sir William Grant, M. R., was clearly of opinion that the defendants had no power to lay out the money upon personal security.

In *Keays v. Lane* the investment clause empowered the trustees, with the consent of the tenant for life, to invest the trust funds, amongst

Pocock v. Reddington.

^{6.}

<sup>3 Ir. Rep.,
Eq. 1.</sup>

other securities, "*in real or personal or government securities in Ireland.*" The trustees lent the fund to the tenant for life upon his bond, with a policy of assurance on his life as collateral security: the Lord Chancellor of Ireland held that this loan was a breach of trust.

2 Moll. 534. In *Fitzgerald v. Pringle* the wife's portion was upon marriage settled upon the usual trusts for husband and wife and survivor for life with remainder to their issue, with power to the trustees to call in "*and lay out the money at greater interest if they could.*" The trustees sold a certain amount of stock, and laid out the proceeds of sale on an annuity for one life, and insured the life. Lord Chancellor Manners held that the purchase of the annuity was not a proper disposition of a trust fund so settled.

L. R., 10 Eq.
26.

Insufficient
appropriation.

In *Stewart v. Sanderson* the trust was "to lay out and invest, or continue invested, the sum of 15,000*l.*, in or upon government, real or personal security, or in such *stocks, funds, or shares as they* (the trustees) *might in their absolute discretion think fit:*" the income was to be paid to the testator's wife for life for her separate use, and subject to the provision for his wife, the testator gave the 15,000*l.* in trust for his children on attaining twenty-one equally. When the suit was instituted some of the testator's children were

still infants, and the investments representing the 15,000*l.*, included 7*l.* per cent. preference stock, and 7*l.* per cent. guaranteed stock in certain railways. The greater portion of these investments had been made by the testator, and had not been converted. Vice-Chancellor Malins held that the infants could not be bound by such an appropriation. "It is true," he said, "that the trustees have a wide discretion given them by the will, since they may invest the money in government, real or personal security, *or in such stocks, funds, or shares, as they may in their absolute discretion think fit.* But the doctrine of the Court is, that any appropriation of funds, the interest of which is given to a person for life and the capital to remaindermen, must be in securities of a permanent character. . . . The trustees have ample power to invest as they think fit, but that does not enable them to invest upon securities which, at the time, are commanding a higher rate of interest, in consequence of their being determinable." The minutes declared that there had not been a sufficient appropriation of the 15,000*l.*, and that the trustees were bound to make a proper appropriation of that sum, or equivalent securities.

Where trustees have power to invest in the shares of any company, they should, before investing, inform themselves as to the constitution of

Precautions
before invest-
ing in shares
of a company.

21 Ch. D.
302.

the company and its rights against its shareholders. In the *New London and Brazilian Bank v. Brocklebank*, trustees having such a power invested in the shares of a company by the articles of which it was provided that the company should have a first and paramount charge on the shares of any shareholder for all monies owing to the company from him alone or jointly with any other person, and that when a share was held by more persons than one, the company should have a like lien and charge thereon in respect of all monies so owing to them from all or any of the holders thereof alone or jointly with any other person. One of the trustees was a partner in a firm which went into liquidation, owing the company a debt which had arisen long after the registration of the shares in the names of the trustees. It was held both by Vice-Chancellor Bacon, and by the Court of Appeal, that the bank had a lien on the shares for this debt which must prevail over the title of the *cestuis que trust*. At the close of his judgment in the Court of Appeal, Sir George Jessel, M. R., said, "It must not be assumed from anything I have said that because the trustees were authorized to invest in the shares of any company, they were justified in investing in the shares of a company whose articles contained provisions such as those now under consideration."

It is stated generally by Mr. Justice Story, that Sect. 1273 c.
 “trustees have no power to make the *cestuis que*
trust parties to any co-partnership or joint stock
 company; and if they assume any responsibility
 by way of subscription for shares subject to future
 calls, the obligation will be considered a personal
 one, on the part of the trustee, unless in the act of
 subscription pains are taken to guard against any
 such implication, in which case the extent of his
 liability will be solely a question of construc-
 tion.” And as his authority for this proposition,
 the learned author cites the case of *Lumsden v.* 4 Macq.
H. L. C. 950.
Buchanan: see also *Buchan’s case (City of Glasgow*
Bank) in which *Lumsden v. Buchanan* was cited. 4 App. Cas.
583.

It should be borne in mind that by the 30th Trustee is a
shareholder
under Com-
panies Act.
 section of the Companies Act, 1862, it is enacted
 that, “No notice of any trust, express, implied, or
 constructive shall be entered on the register, or be
 receivable by the registrar, in the case of com-
 panies under this act, and registered in England
 or Ireland.” And it has been decided that if the
 name of the trustee is on the register, he is liable
 to the company for calls, and the insufficiency of
 the trust estate is no defence. See *East of Eng-* 2 Dr. & Sm.
452.
land Banking Company, and *Re Phoenix Life* 2 J. & H. 229.
Assurance Company.

By the Colonial Stock Act, 1877, s. 12, it is 40 & 41 Vict.
c. 59.
 enacted that “a trustee shall not apply for, or hold
 Colonial
 stock.”

a stock certificate to bearer issued under this act, unless expressly authorized to do so by the terms of his trust."

Leaseholds
for lives.

MORTGAGES.

16 Beav. 600.

In *Macleod v. Annesley*, the sole trustee of a settlement (whereby a sum of 10,000*l.* was settled) lent a large portion of the trust fund (7,320*l.*) upon mortgage of estates in Ireland which were held for lives at a rent of 42*l.* 12*s.* 11*d.*, with a covenant for perpetual renewal on payment of a peppercorn: the trust being for the trustees or trustee to lend to a person named in the deed "at interest on the security of any freehold, leasehold or copyhold messuages, lands or other hereditaments of competent value, in any part of England or Ireland," and also, that it should and might be lawful in case the 10,000*l.* or any part of it should not be advanced to the person named in the deed "to lay out and invest the 10,000*l.* in their or his name or names in the public funds of the United Kingdom of Great Britain and Ireland, or upon government or *real security* in England, Ireland, Scotland or Wales." The advance having been made as above mentioned, and not to the person named in the deed, it was contended that on a loan to any other person, the security must be a "real security," and that a power to lend on "real

security" did not authorize a loan on the security of the leaseholds. The Master of the Rolls considered that where a power is expressly given to trustees to invest trust money on land in Ireland, they would not be precluded from investing it in leaseholds perpetually renewable with a head rent, that being the common tenure of land in Ireland: but considering the large head rent, always to be paid, his Honour hardly considered it safe for a trustee to advance money on such a security to a greater extent than is allowed by the Court to be advanced on a freehold house: namely, one-half.

In *Lander v. Weston*, where the trusts for investment of the settled fund were upon government or real securities, or in purchase of land, the trustees sold the stock and invested it on mortgage to the husband on his bond, his life interest in real estate, and certain policies: the transaction was held by Vice-Chancellor Kindersley to be a breach of trust. "It has been suggested," observed his Honour, "that the securities given were within the power, because there was the security of real estate: and that it was legitimate to sell the stock, although the trustees might have been liable for any imperfection of the security: but I think, if I were to hold that, I should be opening the door to breaches of trust."

Macleod v. Annesley.

3 Drew. 389.

Mortgage of husband's life interest in real estate, with policy.

Leaseholds
for years.

8 Ch. D. 492.

At p. 508.

14 Ch. D.
626.

It appears at one time to have been considered that where there was a power to lend on mortgage of real estate, there was no objection on principle to an investment on a long term of years at a peppercorn rent. It was said, however, by Sir George Jessel, M. R., in *In re Chennell*, that he had always understood that a leasehold security was, *primâ facie*, an improper investment of trust money, and that it lay on the trustee to justify it: and that it would be justified if the leaseholds were held at a peppercorn rent, for a long term, without covenants, and without impeachment for waste. This was an observation made during the argument: in his judgment, the same learned judge observed, that in his opinion "as a general rule, a trustee empowered to lend money upon real securities is not entitled to lend the money upon mortgage of a leasehold estate. By that I mean that, *primâ facie*, it is a breach of trust." And in the same case Lord Justice James said, "I think it is very desirable that trustees should be warned that they must not, without express authority, lend money on leasehold securities." In the later case of *In re Boyd's Settled Estates*, the late Master of the Rolls, Sir George Jessel, said, "I desire to express my opinion, that, as a general rule, long terms of years do not answer the description of 'real securities.'"

It was pointed out by the same learned judge, in *In re Chennell*, that in former times an owner in fee generally mortgaged by granting a term, and that if such a security would be proper, it would be difficult to say that a mortgage by assignment of a long term at a peppercorn rent, without impeachment of waste, was an improper security. However, by the provisions of the recent Conveyancing Acts, long terms of years at a peppercorn rent may, in the cases provided for by these acts, be enlarged into a fee simple, and the question discussed in the two cases last cited may usually be avoided by the exercise of the powers contained in these acts.

8 Ch. D. at p. 504.

44 & 45 Vict. c. 41, s. 65, and 45 & 46 Vict. c. 39, s. 11.

It appears that where trustees are authorized and required at the instance of the tenant for life to invest the trust fund in the purchase of leaseholds, they have no option if the tenant for life insist upon his right. The head-note to *Cadogan v. Earl of Essex* is as follows: "By a deed power was given to trustees, and they *were required*, with the approbation of the tenants for life, to invest in the purchase of leaseholds: Held, that it was compulsory on them to invest, when called upon to do so by the tenants for life." Vice-Chancellor Kindersley said, the case came within *Beauclerk v. Ashburnham*, where the words were with the "consent and direction" of the tenant for life.

Short leaseholds with covenants.

2 Drew. 227.

8 Beav. 322.

General rule
as to short
leaseholds.

But, as a general rule, it need hardly be said that upon trustees, lending on the security of leaseholds of short duration and encumbered with covenants and forfeiture clauses, the onus would be cast of showing the perfect propriety of such an investment: see *Fuller v. Knight*, where the investment of part of a trust fund, which should have been laid out on freeholds, on the security of leasehold estates, was admitted to be a breach of trust, and was so treated by Lord Langdale in his judgment.

6 Beav. 205.

31 Ch. D. 390.

And see the recent case of *Bahin v. Hughes*.

Second
mortgages.

14 Beav. 291.

Trustees should not advance trust monies upon a second mortgage. In *Norris v. Wright*, where the trust was to invest the trust monies in the funds, or "at interest upon government securities or real security in England," and part of the trust fund had been advanced upon a second mortgage of an estate in Northumberland, Lord Romilly said, "I beg, however, that it may not be understood that I sanction the propriety of trustees lending money on a second mortgage, when they do not get the legal estate. I do not know that that has ever been determined, and I do not mean to express an opinion, that a trustee is ever justified in lending money on real security when he does not get the legal estate."

15 Beav. 221.

And in *Drosier v. Brereton*, where the trust was to invest in the funds or "on real securities," and

the trustees lent part of the fund on a second mortgage of house property, Lord Romilly said, "It appears that part of the money was invested on a second mortgage of house property . . . I have no doubt that it was a breach of trust to lend this money on a second mortgage of house property." See also the judgment of the Lord Chancellor, Lord Cranworth, in *Lockhart v. Reilly*.

1 De G. & J.
at p. 476.

The objections to such securities are obvious: the principal ones may be summarised as follows:—

1. In making such advances the trustees get neither the legal estate, nor the title deeds.
2. If first mortgagee bring his action for foreclosure, the trustees forfeit their interest, unless they redeem.
3. The first mortgagee may sell the property at a great disadvantage, and the trustees cannot prevent it unless by redemption.
4. Mortgagor may obtain an advance upon a third mortgage, without disclosing the second; and the third mortgagee might get in the first mortgage, and tack his original mortgage to it, and squeeze out the second (trustee) mortgagee.

Nor should trustees advance the trust fund upon a deposit of title deeds. In the case of *Swaffield v. Nelson*, where the trust for investment was "to invest upon real or government securities,"

Equitable
mortgages.

W. N. 1876,
p. 255.

the trustee lent a sum of 5,700*l.* upon an equitable mortgage by deposit of title deeds, with an undertaking by the mortgagors to execute a legal mortgage when called upon. The plaintiffs sought to have the monies so advanced brought into Court. On behalf of the defendant trustee it was contended that the investment was an investment upon "real security" within the terms of the trust: and that it had never been decided that an investment on equitable mortgage was unauthorized where there was power to invest upon real securities. Sir George Jessel, M. R., said, that it had never been decided that an investment upon equitable mortgage was unauthorized when there was power to invest on real securities, *because it had always been assumed to be the law of the Court without calling for decision.* His lordship ordered the defendant to pay the money into Court within six months.

Contributory
mortgages.

Trustees should not join in contributory mortgages, so as to mix up the trust fund with the monies and rights of strangers.

30 Ch. D.
490.
Sub-mort-
gages.

In *Smethurst v. Hastings* (*ante*, p. 46), where trustees, having power to invest on leasehold securities, invested on sub-mortgages of leasehold houses, it was contended by the plaintiffs (the beneficiaries), that a sub-mortgage is not a security on the property originally mortgaged, but only upon the money due under the original

mortgage; that being only a mortgage of a mortgage debt, it is nothing more than a personal security. On behalf of the defendant trustees it was urged that a sub-mortgage might afford a double security, as securing the benefit of not only the covenant of the sub-mortgagor, but also, by the assignment of the original debt, the benefit of the covenant of the original mortgagor. Vice-Chancellor Bacon thus alluded to the question in his judgment: "It has been suggested," he said, "by the plaintiffs that this form of security is objectionable, but I do not know that it is a matter of any importance so far as relates to the mere form of the security, since it contains Carr's (the sub-mortgagor's) covenant for payment, and an assignment of the original power of sale." Beyond this the learned judge does not appear to have given any decision upon the point.

A trustee, under an ordinary power to vary securities, may not lend a sum of stock on a mortgage of real estate conditioned for replacement of the specific stock on a future day, and the payment of half-yearly sums equal to what would have been the dividends in the meantime. In *Whitney v. Sewell*, where the trust for investment was to invest "in government or parliamentary stocks of Great Britain, or upon real securities in England or Wales," with power to vary the investments as

Stock mortgages.

L. R., 4 Ch. App. 513.

occasion might require or as should be thought fit, and the trustee sold a sum of consols, part of the trust estate, and invested the proceeds on a stock mortgage, it was held that this was an improper investment. Sir G. M. Giffard, L. J., observed, "Then as regards the stock mortgages, I have no hesitation in saying that under the usual powers to vary securities, a loan upon a stock mortgage is not a thing which is justified by those powers. It must not be a stock mortgage, but a mortgage in the ordinary way for securing certain fixed capital."

Railway
mortgages.

As to this class of security, see *ante*, pp. 109 *et seq.*, and the cases there referred to.

29 Beav. 213.

In *Rheden v. Wesley*, a testatrix bequeathed her residuary estate to her executors, upon trust to convert and invest "in government stocks in the Bank of England," until a suitable investment in leaseholds was found. The will contained a declaration that the trustees should not be accountable for involuntary losses or *for any banker, &c.*, with whom the trust monies should be deposited for safe custody. At her death a sum of cash was deposited at interest to her credit in the Union Bank of London. Shortly after her death the executors drew it out, and one of them paid the greater part of it into the Royal British Bank on a deposit account in their joint names. The bank

Deposit
account.

stopped payment some months after, and a loss accrued. The Master of the Rolls held both trustees liable; he said, "It was an investment, not a deposit. The executors drew out the money, and invested it in another security not authorized by the will."

It will be gathered from the cases cited at greater or less length in this chapter, that trustees must exercise the greatest possible caution before they venture to invest trust moneys upon personal securities, *even where the discretion given to them is apparently of the widest possible description.* General observations on the cases referred to.

In such a case, for instance, as *Fitzgerald v. 2 Moll. 534. Pringle*, where the trust was to call in the trust fund "*and lay out the money at greater interest if they could,*" we have seen (*ante*, p. 132) that the purchase of an annuity for one life—which life the trustees insured—was held by the Lord Chancellor in Ireland to be an improper investment of funds settled upon the husband and wife and the survivor of them for life, with remainder to their issue. So it would appear that the trustee must look not only at the words used in the investment clause, but also at the parties who are intended to benefit by the instrument creating the trust: and though the widest possible discretion be given to him, he will not be justified in exercising that

discretion so as to favour the tenant for life at the expense of the remaindermen.

It is the duty of the trustee, in a word, in every case, whether the instrument contains no investment clause at all, or whether it gives the widest possible powers and discretion to the trustee, in regard to investment, to look at all the objects and intentions of the trust; it is conceived that in the one case as much as in the other he is bound to see that the trust fund is not placed in any jeopardy, and that one class of beneficiaries does not benefit at the expense of another. Thus the prudent trustee will avoid being led away by words which at first sight may appear to give him absolute, unfettered, and irresponsible power, as regards investment, over the trust fund.

3 My. & Cr.
at p. 496. The following extract from the judgment of the Lord Chancellor, Lord Cottenham, in *Clough v. Bond*, may appropriately close this chapter:—

“It will be found to be the result of all the best authorities on the subject, that, although a personal representative, acting strictly within the line of his duty, and exercising reasonable care and diligence, will not be responsible for the failure or depreciation of the fund in which any part of the estate may be invested, or for the insolvency or misconduct of any person who may have possessed it, yet, if that line of duty be not

strictly pursued, and any part of the property be invested by such personal representative in funds or upon securities not authorized, or be put within the control of persons who ought not to be intrusted with it, and a loss be thereby eventually sustained, such personal representative will be liable to make it good, however unexpected the result, however little likely to arise from the course adopted, and however free such conduct may have been from any improper motive. Thus if he leave money due upon personal security, which, though good at the time, afterwards fails. And the case is stronger if he be himself the author of the improper investment, as upon personal security, or an unauthorized fund."

CHAPTER V.

OF PROFITS MADE BY THE TRUSTEE OUT OF THE
TRUST ESTATE.

THERE is, perhaps, no rule in Equity more firmly established than this—that a trustee shall make no profit by his office.

L. R., 7 H. L.
at p. 337.
Rule stated
by Lord
Hatherley.

It is referred to by Lord Hatherley, in *Vyse v. Foster*, as “the well-established principle that no trustee can be allowed to make one pound of advantage out of the trust money which is committed to his trust, with a view to the profiting himself at the expense of his *cestuis que trust*, or at the cost of putting trust property in jeopardy in order that he may profit by the use he makes of it.”

In every case, therefore, where a person clothed with a fiduciary character gains an advantage by availing himself of his situation as a trustee, a constructive trust is raised by a court of equity; and the trustee will be decreed to hold for the benefit of his *cestui que trust*.

Sect. 1277.

Mr. Justice Story observes, “In regard to interest upon trust funds the general rule is that, if

a trustee has made interest upon those funds he shall be chargeable with the payment of interest.

In some cases courts of equity will even direct annual or other rests to be made: the effect of which will be to give to the *cestuis que trust* the benefit of compound interest. But such an interposition requires extraordinary circumstances to justify it. Thus, for example, if a trustee, in manifest violation of his trust, *has applied the trust funds to his own benefit and profit in trade.*

. . . The true rule in equity in such cases is to take care that all the gain shall go to the *cestui que trust*." And in the next section the same Sect. 1277a.

author writes, "It seems to be considered as settled in the English Chancery, that if a trustee himself *put the trust money into his own business*, by which he realizes a profit beyond the rate of interest on the public stocks or other proper securities for the investment of trust funds, or even beyond the legal rate of interest, the *cestui que trust* is entitled to such profit."

It may be useful here to examine some of the Examination of some early cases. earlier cases in which this doctrine is set forth.

As far back as the year 1799, when the case of *Piety v. Stace* was decided by the Master of the 4 Ves. 619 a. Rolls (Sir R. P. Arden), the rules referred to in his judgment are spoken of by that learned judge as "so well understood, that it is waste of time to

Piety v. Stace. repeat them." The testator, in *Piety v. Stace*, gave all his personal estate to the defendant Stace and two other persons, whom he appointed executors, upon trust as soon as conveniently might be after his decease to sell and convert into ready money all such parts of his personal estate as should not consist of money, and to place the same out in the public funds, or upon mortgages, or other good and sufficient securities, with full power to call in and again place out the same in such manner as they should think fit, and to pay the dividends and interest to certain persons for their lives, and after the decease of these persons to dispose of the capital as by his will directed. Stace alone proved the will, the other executors having renounced. This bill was filed claiming an account against Stace, with interest at five per cent. on the balances in his hands, and it appeared upon his answer that he had called in part of the testator's property, that was out upon security, and had used the property generally in his trade, and in various transactions in the public funds, paying only the dividends of the stock to the persons entitled under the will for life; and that he had lent part to his son upon the same terms.

It was contended on the defendant's behalf that the testator only meant that the fund should be well secured, the executors being at liberty under

the terms of the will to *place out the property in Piety v. Stace.* such manner as they should think fit: that no loss had occurred, and that the plaintiffs could not be entitled both to interest and the benefit arising from what the defendant had done.

The Master of the Rolls said, after referring to the trusts of the will, "The manner in which the defendant has thought fit to execute this trust is by selling out good securities, not putting the money out upon any other security, but keeping it himself. It is as gross a breach of trust as any that can be imagined, except spending the money and not being able to repay it: which, if a failure had happened, would have been the consequence. What has been contended is perfectly fallacious. If I do not charge him with interest, I shall give him a benefit. He sells out stock and buys it again at a less price. Suppose he had failed, who would have sustained the loss? Was it done for any benefit to the *cestuis que trust*? He says fairly, his object was to pay the dividends to the persons entitled for life, and to use the surplus himself. He would have the advantage of having the money in his pocket without paying for it: and it would be a temptation to trustees to speculate with the property upon the ground that the Court of Chancery will only make them pay the difference, and they will have the interest in

Piety v. Stace. the meantime. This case is worse from the confidence placed in this executor. I do not see the difference between this and a trustee lending trust money, taking 4 per cent. for the trust and 1 per cent. for his own pocket. There is no doubt he might have got 5 per cent. upon personal security. The rules are now so well understood it is waste of time to repeat them. An executor, if he will take upon himself to act with regard to the testator's property in any other manner than his trust requires, puts himself in this situation : that he cannot possibly be a gainer by it; any gain must be for the benefit of his *cestui que trust*; and if there is any loss upon the capital, as if the stocks rise ever so much, he must replace it, in order that the *cestui que trust* may sustain no damage from his conduct. Every farthing more than the dividends, that lay in his hands, is just so much gain to himself. *For every shilling he got by any of these transactions he shall pay interest at the rate of 5 per cent. for every minute it lay in his hands.* As to what he lent to his son, paying only the dividends of the stock, he ought to have lent it at 5 per cent. What business had he to lend it to his son upon such terms? There is a breach of trust in that respect. He must therefore pay 5 per cent. upon the whole. I suppose he imagined he might make an advantage to

himself if he could do so without any disadvantage to the *cestuis que trust*: which is the notion of trustees: but he must pay for that.” *Piety v. Stace.*

An account was accordingly directed of all the defendant had made, with interest at the rate of 5 per cent. upon the balances in his hands. Account directed.

Piety v. Stace was cited in the later case of 4 Ves. 619a. *Docker v. Somes*, the appeal in which was before 2 My. & K. 655. Lord Brougham, C., in the year 1834.

It will have been observed that the Court in *Piety v. Stace* directed the executor to account with interest at 5 per cent.; in *Docker v. Somes* the Court went a step further, and held that where a trustee mixes the trust fund with his own private moneys, and employs both in his trade, the *cestui que trust* may, if he prefers it, insist upon having a proportionate share of the profits, instead of interest on the amount of the trust funds so employed. Option to beneficiary, where fund employed in trustee's trade.

The facts in *Docker v. Somes* were shortly as follow:—The testator bequeathed his property, consisting (*inter alia*) of a ship, and shares in several other ships, to two sons, Samuel Somes and Joseph Somes, whom he also appointed executors, upon trust for the benefit of his six children, as in his will mentioned. His will contained a proviso that, if his trustees should think it advantageous for his estate, they might carry 2 My. & K. 655. Trust funds employed in trustees' trades.

*Docker v.
Somes.*

on his shipping business for any period not exceeding six years from his death, and might employ in it such capital as was then employed therein, or such greater capital taken from the rest of his property as they should think fit, and that the profits of the business so carried on should be added to the rest of his property and be considered as part thereof, and distributed accordingly. The testator died in November, 1816. The trustees carried on the shipping business for six years. The concern proved a losing one, and at the expiration of the six years the testator's estate was worth less than at the time of his death. The suit was instituted after the six years had expired by a daughter of the testator against the executors and trustees, for an account, and payment of her distributive share. The defendants admitted that within a year after the testator's death they began business in partnership as ship-chandlers and sail-makers, that in winding up their testator's estate they had received divers moneys for which they had charged themselves 5 per cent. from the time of receiving the same, and that such sums were paid in by them at their bankers to the credit of their general account, without distinguishing the same from the moneys employed in their own business, conceiving that as the testator's estate was benefited by receiving

a higher rate of interest than could have been obtained on government or real securities, and as they were making arrangements for putting an end to the shipping business and settling the concerns of the testator's estate, such a temporary disposition of his assets was for the benefit of the persons interested therein, and therefore not objectionable or improper. *Docker v. Somes.*

The Vice-Chancellor, at the hearing, declared that the sums on which the defendants had charged themselves with interest at 5 per cent. were to be considered as employed in their trades, and the Master was directed to inquire what proportion of the profits received by the defendants from such trades was properly attributable to the moneys so to be considered as employed in their trades.

Against that part of his Honour's decree, an appeal was presented.

The judgment of the Vice-Chancellor was affirmed.

The Lord Chancellor, in an elaborate judgment, pointed out that where trustees had invested the trust moneys in such transactions as buying and selling land, or in stock speculations, or in the trade of another person—it being easy in such cases to tell what the gains are—the rule was that the trustee shall account to the *cestui que trust* *Judgment of Lord Brougham, C.*

*Docker v.
Somers.*

for all the gain which he has made. His lordship then proceeded to inquire whether the Court could consistently except from the general rule those instances where the risk of malversation is most imminent, where the trustee is most likely to misappropriate, namely, those in which he uses the trust funds in his own traffic? There was, his lordship admitted, no decision allowing in such cases an account of actual profits: the Court uniformly giving interest at different rates, and sometimes with rests where the trust funds had been employed in the trustee's own trade. "The reason," said his lordship, "which has induced judges to be satisfied with allowing interest only, I take to have been this: they could not easily sever the profits attributable to the trust money from those belonging to the whole capital stock. . . . In cases of separate appropriation, there was no such difficulty: as where land or stock had been bought and sold again at a profit: and here accordingly, there was no hesitation in at once making the trustee account for the whole gains he had made. But where, having engaged in some trade himself, he had invested the trust money in that trade along with his own, there was so much difficulty in severing the profits which might be supposed to come from the money misapplied from those which came from the rest of the capital em-

barked, that it was deemed more convenient to take another course, and instead of endeavouring to ascertain what profit had been really made to fix upon certain rates of interest as the supposed measure or representative of the profits, and assign that to the trust estate.”

After pointing out the convenience of this plan, and also the “sacrifices of justice” made for this convenience, Lord Brougham continued, “But the principal objection which I have to the rule is founded upon its tendency to cripple the just power of this Court in by far the most wholesome and indeed necessary exercise of its functions, and the encouragement thus held out to fraud and breach of trust. What avails it towards preventing such malversations that the contrivers of sordid injustice feel the power of the Court only where they are clumsy enough to keep the gains of their dishonesty severed from the rest of their stores? It is in vain they are told of the Court’s arm being long enough to reach them, and strong enough to hold them, if they know that a certain delicacy of touch is required, without which the hand might as well be paralysed or shrunk up. The distinction, I will not say sanctioned, but pointed at, by the negative authority of the cases, proclaims to executors and trustees, that they have only to invest the trust money in the speculations,

Docker v. Somes.

2 My. & K. at p. 667.

Docker v.
Somes.

and expose it to the hazard of their own commerce, and be charged 5 per cent. on it; and then they may pocket 15 or 20 per cent. by a successful adventure. Surely the supposed difficulty of ascertaining the real gain made by the misapplication is as nothing compared with the mischiefs likely to arise from admitting this rule, or rather this exception to one of the most general rules of equitable jurisdiction."

2 My. & K.
at p. 673.

At the close of his judgment the Lord Chancellor pointed out that should in any case a serious difficulty arise in tracing and apportioning the profits, that might be a reason for preferring a fixed rate of interest in that particular case.

L. R., 7 H. L.
at p. 337.

Lord Hatherley's remarks upon *Piety v. Stace* and *Docker v. Somes*.

^a 4 Ves. 620.

^b 2 My. & K.
655.

In the case of *Vyse v. Foster*, already quoted, Lord Hatherley referred to, and expressly approved, the doctrine of ^a*Piety v. Stace*, and ^b*Docker v. Somes*. His lordship said, "I will not say one single word to detract from the somewhat strong expressions used in the case of *Piety v. Stace*, or from those used in the later case of *Docker v. Somes*, in both which cases the learned judges, before whom matters of this description arose with reference to the employment of the money of *cestuis que trust* in partnership or business transactions, have thought it right, with some degree of force and vehemence, almost passing beyond the bounds of ordinary judicial expression,

to mark the decided course that the Court of Chancery will always take in keeping a trustee strictly in bounds with regard to dealing with the money committed to his trust."

^a*Docker v. Somes* was cited in ^b*Townend v.* ^a2 My. & K. 655. *Townend*, where executors and trustees, surviving ^b1 Giff. 201. partners of the testator, directed by his will to invest an infant's legacy on government or real securities, took a security for it in the form of a mortgage on the freehold and leasehold property and fixtures, belonging to the partnership in which they were the testator's surviving partners. Profits by employment of legacy in trustees' trade.

Vice-Chancellor Stuart held that the trustees were bound to account for the profits made by so employing the legacy and interest in their trade. "It is said," his Honour observed, "that is a severe and penal decree. I conceive it to be a decree which the law of this Court makes it imperative upon me to pronounce."

It must be borne in mind that a trustee who is a trader is considered by the Court as employing the trust fund in trade, if he lodge it at his banker's, and place it in his own name: for a merchant must generally keep a balance at his banker's, and this answers the purpose of his credit as much as if the money were his own: per Lord Thurlow, C., in *In re Hilliard*. Trader-trustee keeping trust moneys at his banker's.

1 Ves. jr. 90.

As to the interest allowed to the tenant for life What part of profit to be

treated as
capital.

in respect of income, when trust funds have been improperly employed in trade, and what proportion of the profits are to be treated as capital, see *In re Hill, Hill v. Hill*.

50 L. J.,
N. S. 551.

The cases considered in this chapter show sufficiently, it is hoped, the extreme strictness with which the Court enforces the rule that no trustee shall be allowed to make any profit whatever by the employment in his own trade of any portion of the fund of which he is a trustee.

No remunera-
tion allowed
to trustees.

It may be added that the general rule of the Court deprives the trustee from receiving any remuneration for his personal services.

15 Ves. 584.

Thus, in *Sutton v. Jones*, Lord Eldon, C., acted upon the general rule that a trustee shall not be receiver with emolument, observing that "if the infant is to pay a receiver, he is entitled to have his judgment checked by the persons executing the power, which is to be executed as coupled with a trust." The rules as to solicitor-trustees, and trustees who happen to be brokers, bankers, &c.,

8th ed. p. 280
et seq.

are stated, and the authorities given, in Mr. Lewin's treatise. But, as the matter is not immediately connected with the subject of this work, it is not proposed to pursue it further here.

CHAPTER VI.

OF NEGLECT BY THE TRUSTEE TO INVEST: AND OF
BRINGING THE FUND INTO COURT.

It happens sometimes that a trustee neither invests the fund properly, according to the directions contained in the instrument creating the trust, or, if that is silent upon the subject, in such manner as we have seen is open to him, nor commits that breach of trust which we have recently considered, namely, that of investing the fund improperly: it may be that he abstains from investing the fund at all.

We proceed to consider the case where the trustee, by non-investment, allows the fund to lie idle, and, probably, in danger, and the right of the beneficiaries in such a case to have the fund brought into Court.

It is a well-established rule that if trustees are directed to invest trust money in the public funds, and instead of doing so they retain the money in their hands, the *cestuis que trust* may elect to charge them either with the amount of the money, or with the amount of stock which might have been purchased with the money. This opinion was

Unnecessary
retention of
the funds.

4 Ha. 500. expressed by Vice-Chancellor Wigram in *Shepherd v. Moul*s, and was approved by the Court of Appeal in Chancery in the case of *Robinson v. Robinson*.
 1 De G., M. & G. 247.

Sect. 1278. The object of this doctrine is, says Mr. Justice Story, to compensate the *cestui que trust*, and to place him in the same situation as if the trustee had faithfully performed his own proper duty.

Sect. 1279. The Roman law, observes the same author, acted with the same protective wisdom and foresight. In that law, if a guardian, or other trustee, was guilty of negligence in suffering the money of his ward to remain idle, he was chargeable at least with the ordinary interest. "*Quod si pecunia mansisset in rationibus pupilli, præstandum quod bonâ fide percepisset, aut percipere potuisset, sed fœnori dare, cum potuisset, neglexisset; cum id, quod ab alio debitore nomine usurarum cum sorte datur, ei, qui accipit, totum sortis vice fungitur, vel fungi debet.*"

Dig. lib. 26, tit. 7.

Unnecessary sale of stock.

Lewin, 8th ed. p. 336.

So again if the trust fund is standing upon a proper security, and the trustee calls it in for no purpose connected with the trust, and therefore in dereliction of his duty, or for a purpose not authorized by the terms of the trust, he will be compellable at the option of the *cestui que trust* either to replace the specific stock, or the stock into which, if not sold out, it would have been converted by act of parliament, with the intermediate dividends;

or to account for the proceeds of sale with interest at 5 per cent.

In *Phillipson v. Gatty*, the marginal note states, 7 Ha. 516.

“where trustees having power to invest on government or real security, and vary such investment from time to time, sold out stock for the purpose of investing the produce of the stock in a mortgage which they were not justified in taking, it was *held* that the Court could not treat the sale of the stock as lawful, and the investment as unlawful, so as to satisfy the trust by replacing the money; but that the whole must be treated as one unjustifiable transaction, and that the trustees must replace the stock.”

After deciding that the investment on mortgage in question was an improper one, Vice-Chancellor Wigram, in his judgment, said: “Then comes another material question,—Are the trustees to replace the stock or the money produced by the sale? Mr. Wood argued that they were liable to make good the money only, distinguishing the sale, which he said was lawful, from the investment which I have decided to have been a breach of trust. My opinion is that the trustees must replace the stock. There was no authority to sell, except with a view to a re-investment; and here the sale was made with a view to the investment I have condemned. It was all one transaction,

Phillipson v. Gatty.

and the sale and investment must stand or fall together."

This judgment was affirmed by the Lord Chancellor.

14 Beav. 319.

See also the case of *Davenport v. Stafford*.

2 Bro. C. C. 653.

And in *Bostock v. Blakeney*, Mr. Justice Buller, sitting for the Lord Chancellor, held that where stock was sold by a trustee, contrary to the trust, the *cestui que trust* has a right to elect to have the stock restored, or the produce of it paid, *as the trustee shall never make the advantage when he could replace the stock at a less price than that at which he sold it.*

1 J. & W. 586.

In *Crackett v. Bethune*, an executor, directed to lay out assets in the funds, unnecessarily sold stock and kept large balances in his hands: he was charged with 5 per cent. interest and costs.

Bankruptcy of trustee.
3 Bro. C. C. 196.

If the trustee should become bankrupt it appears, on the authority of *Ex parte Shakeshaft*, that the *cestui que trust* may at his option prove for the proceeds of sale with interest, or for the price of the specific stock at the date of bankruptcy with interim dividends.

Funds left at bankers'.
Sect. 1270 a.

"The question of the loss of trust funds," it is stated in Story's Jurisprudence, "by means of the failure of bankers is a constant source of controversy in the English courts of equity. If the

investment is made with a banker, in a manner not authorized by the will, the trustee will be held responsible (as we have already seen in *Rheden v. 29 Beav.* 213. *Wesley, ante*, p. 144). But, as a general thing, it is said there is no impropriety in the temporary investment of trust money on a deposit note."

The statement contained in the last paragraph of this section appears to be founded upon the observations of Lord Westbury, C., in *Wilkins v. 8 Jur., N. S. Hogg*, where trustees, until an eligible investment²⁵ could be found, deposited the trust funds in their joint names in a bank. "The money was to be deposited," as the report of the judgment states, "on what was known as a deposit account, which differed from a common drawing account in the particular that in the former a notice of some days was required prior to the withdrawal of the money, and it was not a common practice among bankers to pay interest on moneys otherwise deposited. His lordship saw nothing improper in this mode of dealing with the property, regarding it as a mere temporary investment: *it was not material, however, to decide that.*"

In *Challen v. Shippam*, a trustee deposited a⁴ *Ha.* 555. trust fund with his bankers, accompanied with an order to invest the money in consols; the bankers omitted to make the investment, and for five

months the trustee made no inquiries : the bankers became bankrupt : the trustee was held liable for the loss which was sustained. The decree was for payment by the defendant trustee of the amount deposited, with interest at 4 per cent., and costs. And see *post*, p. 168, under "General rule as to neglect to invest."

Mixing trust
funds by
trustee.

Story, sect.
1277 g.
L. R., 7 Eq.
466.

If a trustee mix the trust fund with his own moneys, either at his bankers or otherwise, he will become responsible for the replacing of the trust money with interest during the intervening period. It was said by Vice-Chancellor Stuart, in *Cook v. Addison*, that "It is a well-established doctrine in this Court, that if a trustee or agent mixes and confuses the property which he holds in a fiduciary character with his own property, so as that they cannot be separated with perfect accuracy, he is liable for the whole. This doctrine was explained by Lord Eldon in *Lupton v. White*."

15 Ves. 432.

Turning to *Lupton v. White*, we find that Lord Eldon refers to this doctrine as "the great principle, familiar both at law and in equity, that, if a man, having undertaken to keep the property of another distinct, mixes it with his own, the whole must, both at law and in equity, be taken to be the property of the other, until the former puts the subject under such circumstances, that it may be distinguished as satisfactorily, as it might have

been before that unauthorized mixture upon his part."

So if a trustee purchase an estate partly with his own money, and partly with the trust fund, his *cestui que trust* has a lien upon the whole for the amount that was misemployed: *Lane v. Dighton*. Ambler, 409.

"But," continues Mr. Justice Story, in the 1277 g. section last referred to, "the *cestui que trust* cannot claim any balance remaining in the hands of the bankers of the trustee when it does not appear that any portion of such balance arose from the same identical money:" and the learned author refers to the case of *Brown v. Adams* as his ^{41 L. T., N. S. 71.} authority for this proposition.

In *Eager v. Barnes*, one of the trustees was a ^{31 Beav. 579.} member of a firm of solicitors, and, with the Trust funds in coffers of solicitors. sanction of his partners, part of the trust funds came into the coffers of the firm, and was misapplied by the trustee: it was held that not only the trustee, but his partners also were liable to make good the loss.

"It may be stated as a general rule, that if a ^{General rule as to neglect to invest.} trustee be guilty of any unreasonable delay in investing the fund, or transferring it to the hand destined to receive it, he will be answerable to the *cestui que trust* for interest during the period of laches." Thus is the general rule given by Mr. ^{8th ed. p. 338.} Lewin.

1 Mad. 290. In *Tebbs v. Carpenter*, Vice-Chancellor Plumer said that "A special case is necessary to induce the Court to charge executors with more than 4 per cent. upon the balances in their hands." See general rule as stated *post*, p. 171.

Interest on
arrears of
income.

L. R., 2 Ch.
App. 225.

It has been said, however, that the Court is not in the habit of giving interest on what may be found due for arrears of income; and this, upon the authority of *Blogg v. Johnson*, where the head note states as follows: "The Court will not charge an executor, who has been guilty of delay in accounting, with interest on arrears of income unpaid by him.

"I. was entitled to a life income from the estate of her husband, and died in 1861. A bill was filed by her executor, in 1862, against the executor of her husband's will, who had been his partner in business, for an account of income due to her estate. In 1863, accounts were directed. In 1866, a certificate was made, finding that a large sum was due from the husband's executor:—

"*Held*, that he was not chargeable with interest before the date of the certificate."

2 Russ. & My.
710.

Funds lying
idle at
bankers' who
fail.

In *Moyle v. Moyle*, the trust was to convert with all convenient speed, and after payment of debts, &c., invest in 3 per cent. consols, or some other of the parliamentary stocks, and apply the dividends as directed by the will. The will contained a

clause that the trustees should not be liable for any loss which might happen by the failure or insolvency of any banker with whom the trust moneys might be lodged for safe custody or investment, or otherwise in the execution of the trusts.

The trustees, for upwards of a year after the testator's death, allowed a considerable portion of the assets to lie unproductive in the hands of a banker, who failed: they were held liable to make good the loss.

In the course of his judgment, the Lord Chancellor (Lord Brougham) said, "In this case it is clear that if these executors had been acting in their own affairs, they would not have allowed so large a sum to lie unproductive in the hands of a banker, exposed to the hazard of his failure."

It should be mentioned that in *Johnson v. 11 Ha. 160.* *Newton*, Vice-Chancellor Sir W. P. Wood said, of *Moyle v. Moyle*, that it was "very strong, and it was a hard case upon the executors:" but that learned judge does not appear to have differed, and in another part of his judgment he distinguishes it from the case before him, and thus referred to it: "In *Moyle v. Moyle* there was an express direction to invest the surplus, and the defendants had moreover not only resisted an application for the payment into Court of the

2 Russ. & My.
710.

balance which appeared in their hands, but had also, after the balance had been greatly increased, kept it at their bankers, *without any sufficient reason, for considerably more than two years after the death of the testator.*"

1 Beav. 525.
Funds unnecessarily on deposit at bank.

In *Darke v. Martyn*, where the trustees deposited part of the assets in the hands of their bankers—more than twelve months after the testator's death—on the bankers' notes carrying interest, and the bankers failed, Lord Langdale, M.R., held the trustees responsible for the loss, *no necessity having been shown for the deposit*. His lordship said, "With respect to these sums, I have no doubt: if the executors had stated in their answer that it was necessary for the purposes of the will to have a balance in hand, and that they had kept these sums in the hands of the bankers, it would be a subject of excuse: but as I understand the facts, they are quite inconsistent with such a statement. . . . These sums were improperly lent on the personal security of the bankers: the trustees therefore became answerable."

Temporary deposit, when allowable.

A trustee may deposit trust money for temporary purposes in a responsible bank, but it should be done in such a way that the *c'estui que trust* may follow it into the hands of the bankers; and it must not be allowed to remain longer than

3 Ves. jr. 565. the purposes of the trust require: see *Routh v.*

Howell; also the case of *Johnson v. Newton*, above 11 Ha. 160. referred to.

“If an executor has retained balances in his hands which he ought to have invested, the Court will charge him with simple interest at 4 per cent. on these balances; if, in addition to such retention, he has committed a direct breach of trust, or if the fund has been taken by him from a proper state of investment in which it was producing 5 per cent., he will be charged with interest after the rate of 5 per cent. per annum; if, in addition to this, he has employed the money so obtained by him in trade or speculation for his own benefit and advantage, he will be charged either with the profits actually so obtained by him from the use of the money, or with interest at 5 per cent. per annum, and also with yearly rests, that is, with compound interest.”

Such was the rule laid down by Sir John Romilly, M. R., in *Jones v. Foxall*: and the dicta in the various cases appear to support it.

In *Penny v. Avison* (a later case), Vice-Chancellor Wood said, “There are now three cases in which the Court charges more than its usual rate of 4 per cent. upon balances due from a trustee. This will be done, first, where the trustee, in the opinion of the Court, ought to have received more than 4 per cent.; secondly, where he actually has

General rule as to rate of interest on balances.

3 Jur., N. S. 62.

received it; thirdly, where he is, in the opinion of the Court, to be presumed to have received it."

49 L. T.,
N. S. 91.

In a recent case, *Jones v. Searle*, trustees had allowed large balances to remain at their bankers, or in their hands, unemployed. The beneficiaries asked for 5 per cent. interest. Vice-Chancellor Bacon said, that "if a man chooses not to invest money, but pays it into his account at his bankers, he borrows it, and he must pay 5 per cent. from the date of the payment of the testator's debts and liabilities."

L. R., 5 Ch.
App. 233.
4 De G., M.
& G. at p. 851.
L. R., 8 Ch.
App. at p.
333.
17 Ch. D.
142.

See also *Burdick v. Garrick*. And see the observations of Lord Cranworth in *Att.-Gen. v. Alford*, approved by Lord Justice James in *Vyse v. Foster*.

In *In re Emmet's Estate*, where the trust was, after the determination of a life estate, to pay a fund to a child on attaining twenty-one years, with a provision for accumulation if the child should be an infant when the life estate determined, and the trustee, after the child attained twenty-one, retained the fund, it was held by Vice-Chancellor Hall that the trustee must be taken to have continued to hold the fund after the child attained twenty-one, on the same trusts, and with the same obligations to accumulate as before, and that he was liable to account for the fund with compound interest: and it appearing

that part of the fund had been invested at 5 per cent. and at other rates of interest upon authorized securities, and that the rest had been either improperly invested or had been mixed with the trustee's own moneys, it was further held, that as to so much of the fund as had been properly invested, interest must be calculated at the rate actually yielded; that the rest of the fund must be treated as having been in the trustee's hands uninvested, and that, *under the circumstances*, he must be charged with compound interest thereon at 4 per cent.

The Vice-Chancellor said, "I think that there At p. 150. is no absolute rule of law which compels me, under all the circumstances, to charge this trustee with 5 per cent., and I shall charge him with compound interest at 4 per cent."

Mr. Lewin observes that, "Whether, where the 8th ed. p. 342. money has been employed in trade, simple or compound interest shall, as a general rule, be charged, is a point upon which the decisions are in conflict, the older authorities pointing to simple interest as the proper measure of liability, and the more recent to compound interest."

And in the case of *Att.-Gen. v. Alford*, already 4 De G., M. & G. 843. referred to, Lord Cranworth, C., after stating that one question then before him was, "what is the principle by which, in the case of executors and

trustees having money in their hands which they ought to invest and do not invest, the Court is regulated in dealing with them in respect of interest," observed, "I have always felt this to be a very unintelligible question, for there is no definite rule applicable to it."

- 15 Beav. 388. It should perhaps be mentioned that *Jones v. Foxall* does not appear to have been cited in *Att.-Gen. v. Alford*; and see the observations of Lord Selborne on ^a*Jones v. Foxall* in the case of ^b*Vyse v. Foster*. Also the case of ^c*Burdick v. Garrick*, in which *Jones v. Foxall* was cited.
- ^a15 Beav. 388.
^bL. R., 7 H. of L. at p. 346.
^cL. R., 5 Ch. App. 233.

PAYMENT INTO COURT.

We have already seen that in many cases where the trust fund is improperly invested, the Court will direct that within a certain period the trustee shall pay it into court: as, for instance, where the trust fund has been lent upon an equitable mortgage: *Swaffield v. Nelson* (*ante*, p. 141): where the late Master of the Rolls, Sir George Jessel, ordered the defendant to pay the money into court within six months. So, in *Vigrass v. Binfield*, where the executor acknowledged that he had received the testator's property and had lent it on a promissory note, the Vice-Chancellor, Sir John Leach, said, "The point is settled. He admits

W. N. 1876,
p. 255.

3 Madd. 62.

that he has possessed the property, and he cannot protect himself from the payment of the amount into court by alleging an improper application of it."

But it is not only in such cases that the fund will be ordered into court. It was said by Lord Langdale in *Ross v. Ross*, that there was a time ^{12 Beav. 89.} when it was almost considered as a mere matter of course to order trust funds to be brought into court; "but now" (1849), said his lordship, "the question always is, whether there exists any sufficient ground for such an interposition."

In a later case, *Robertson v. Scott*, Sir John ^{14 L. T., N. S. 187.} Stuart, V.-C., expressed his surprise at the language ascribed to Lord Langdale in *Ross v. Ross*, and said, "As far as I know it is the invariable practice of the Court, in suits for the administration of trust property, to order the money, upon the application of the parties beneficially interested, to be paid into court."

However, in the still later case of *In re Braithwaite*, Vice-Chancellor Hall seemed to doubt the absolute nature of the rule. ^{21 Ch. D. 121.} "Although," added his lordship, "the fund would, no doubt, be brought into court in any case where there was reasonable ground for the application."

It is conceived that the fact of the trustee improperly retaining the funds in his hands

27 Ch. D.
251.

Plaintiffs'
interest.
3 Mer. 29.

uninvested, would be a reasonable ground for applying to have the fund brought into court: see *Hampden v. Wallis*.

The plaintiffs, according to the rule laid down by Lord Eldon in *Freeman v. Fairlie*, must be either "solely entitled to the fund, or have acquired in the whole of the fund such an interest, together with others, as entitles them, on their own behalf, and the behalf of those others, to have the fund secured in court."

10 Ves. 352. It has also been said, upon the authority of *Dolder v. Bank of England*, that "if the defendant admits himself to be a trustee for some one, but it remains to be ascertained whether he is a trustee for the plaintiff or for other parties, the plaintiff may move upon his possible title, where all persons are before the Court, among whom there will be found some one who is entitled."

3 Jur., N. S.
686.

One moiety
ordered in.

In *Hammond v. Walker*, Vice-Chancellor Wood ordered one moiety of the fund into court, the parties entitled to the other moiety not being before the court: his Honour expressing an opinion that, if a proper case were made for doing so, he could, on an application by one of several *cestuis que trust*, order the whole fund into court.

Defendant's
admission.

According to the old rule it was necessary to spell out from the defendant's answer an admission "that the money was in his hands, or that

the stock was in his name:" and "where you moved against several defendants, you must have the admissions of all:" per Lord Langdale, M. R., in *Boschetti v. Power*. In the same case that ^{8 Beav. 98.} learned judge observed, "The Court, however, does not, upon motion, order money to be brought into court upon any evidence which may satisfy the judge of the fact (that the stock is standing in the names of the defendants), but it proceeds alone upon the admissions of the defendant."

Such an admission as will enable the Court to ^{Present practice as to} admission. act, may now be gathered from other sources than the defence.

"There is not, as far as I know," observed Sir George Jessel, M. R. (sitting in the Court of Appeal), in the case of *London Syndicate v. Lord*, ^{8 Ch. D. at p. 90.} "any virtue in one mode of admission rather than in another. What the Court has to be satisfied of is that the defendant has admitted the amount to be due. At one time it was supposed that the admission must be in an answer, and no doubt that was the practice of the Court of Chancery before decree. It was next settled that it need not be in the answer, but that it might be in an affidavit brought in by the defendant, or in an answer to a question which he could not help answering on an examination taken by direction of the Master. Whether it was a compulsory statement on oath

or a voluntary statement on oath was immaterial, because it need not be upon oath at all. A man may admit by his agent or solicitor that the sum is due: he may put in a formal admission to that effect without any oath whatever, or he may act in such a manner as to authorize a third person to admit for him."

And the same learned judge (sitting as a judge
8 Ch. D. 148. of first instance), in *Freeman v. Cox*, where notice of motion was served on a defendant, an executor, for payment into court of money, part of the testator's estate, which it was shown by affidavit that he had received, and the defendant did not appear on the motion, held that the defendant not having disputed the affidavit, there was a sufficient admission that the money was in his hands, and that he must be ordered to pay it into court. The Master of the Rolls said, "Here we have the affidavit of the plaintiff, and the service of the notice of motion on the defendant. This, I think, is a sufficient admission, the principle being to make the defendant pay into court what he does not dispute to be owing from him."

In this case there was no suggestion of any investment, either proper or improper, having been made.

^a 8 Ch. D.
148.

^b 27 Ch. D.
251.

^a *Freeman v. Cox* was cited in ^b *Hampden v. Wallis*, which was before Mr. Justice Chitty in

1884. In the latter case trust funds were ordered to be brought into court by the trustee upon admissions contained in letters, written before action brought, that he had received the money, and a recital to that effect contained in the settlement, his execution of which as trustee was proved, although there was no formal admission in his pleadings or affidavits that he had received and held the money.

In the still later case of *Porrett v. White*, the 31 Ch. D. 52. Court of Appeal expressly approved and followed *Freeman v. Cox*. The defendant in *Porrett v. White*, one of the trustees of a settlement, in letters written to the plaintiff, his co-trustee, before action brought, admitted having received part of the trust moneys and invested the same in an unauthorized manner. The defendant appeared, and the plaintiff took out a summons to have the moneys brought into court, and made an affidavit deposing that he had paid the moneys in question to the defendant, and stating the admissions contained in the defendant's letters as to its application. The defendant did not answer this affidavit, or adduce any evidence. Mr. Justice Chitty ordered the money into court, on the ground that the letters were a sufficient admission within Ord. XXXII. r. 6. The defendant appeared, and the Court of Appeal held that, as

Ord. XXXII.
r. 6.

the defendant had not met the affidavit, there was a sufficient admission that the money was in his hands, and that the appeal must be dismissed.

Fry, L. J., in
Porrett v.
White.

Lord Justice Fry said, "I am not satisfied that this case does not come within the General Orders, and if it were necessary to decide whether there is not an admission within Ord. XXXII. r. 6, I should wish to consider the matter further : but I agree in deciding this case on the ground taken in

8 Ch. D. 148. *Freeman v. Cox.*"

It may be noted that before the decision of the 31 Ch. D. 52. Court of Appeal in *Porrett v. White*, the Vice-L. R. (Ir.), Chancellor in Ireland had, in *Nesbitt v. Baldwin*, 7 Ch. 134. declined to follow the decision of Sir George 8 Ch. D. 148. Jessel in *Freeman v. Cox*.

Admission of
plaintiff's
title.

It is conceived that under the present practice any admission of the plaintiff's title by the defendant, whether express or implied, is sufficient to enable the Court to order the money to be paid in : though formerly the rule was no doubt stricter : *Dubless v. Flint*.

4 My. & Cr.
502.

Fund need
not be in
defendant's
hands at date
of defence.

It may be added that it is not necessary that the defendant should acknowledge that the fund is in his hands at the date of the defence : if he admits that he once received it, and afterwards dealt with it in an unauthorized manner, the Court will act upon his having received it, and not allow

him to escape by pleading that he has committed a breach of trust.

So in *Wiglesworth v. Wiglesworth*, two trustees 16 Beav. 269. having power to vary a trust fund, sold it out for that purpose, but allowed the produce to be received by one alone : it was held, upon motion before decree, that the other, who failed to show that the fund was properly invested, was bound to pay the amount into court. See also *Ingle v.* 32 Beav. 661. *Partridge*, where the marginal note is as follows :
 “ Trustees authorized a firm of solicitors (one of whom, W., was a trustee) to draw the trust funds out of a bank. W. drew it out and misapplied it. The trustees were, on interlocutory application, ordered to pay the amount into court.

“ Three trustees sold out trust funds and the produce was paid to one alone. The other two were, on motion, ordered to pay the amount into court.”

The application is usually an interlocutory one, Application usually by interlocutory motion. made by motion ; and the Court will not listen to the objection that the action is for the very purpose of securing the fund in question, and that the order for payment in ought not to be made before the trial : see *Rothwell v. Rothwell*. 2 S. & S. 217.

In an anonymous case, the Vice-Chancellor of England (Sir Lancelot Shadwell) said, “ Where an executor admits in his answer that he has received a specific sum belonging to his testator’s Payment in of balance. 4 Sim. 359.

estate, but adds that he has made payments on account of the estate, the amount whereof he does not specify, the Court will allow him to verify the amount of his payments by affidavit, and then will order him to pay the actual balance into court."

Right depends on equity raised by claim.

The right of the plaintiff to have the money brought into court must proceed on an admission made in reference to an equity raised by the statement of claim, and not in reference to an independent equity stated only in the defence: per Lord

4 Beav. 476. Langdale, M. R., in *Proudfoot v. Hume*.

1 V. & B. 49. Order does not extend to interest.

In *Wood v. Downes*, after the usual decree for an account, an application was made for an order for payment into court of a principal sum and interest, the defendant, in his answer to interrogatories, having set forth specific sums which he had received and paid, but having omitted to cast them up, or strike a balance. The plaintiff's solicitor made an affidavit stating that he had struck the balance, which amounted to 8,540*l.* for principal, and had computed the interest thereon, which added to the above made a sum of upwards of 11,000*l.* due from the defendant.

3 Mer. 29. During the argument the case of *Fairly v. Freeman* (qy. *Freeman v. Fairlie*) was referred to, in which case it was alleged, on the part of the plaintiff in *Wood v. Downes*, that the Court had

1 V. & B. 49.

ordered payment into court to be made of a principal sum of 2,000*l.* admitted to be in the defendant's hands, together with interest. Lord Eldon, C., said, in his judgment in *Wood v. Downes*, "I certainly do not recollect any instance in which the Court has gone this length upon motion merely. In the case of *Fairly v. Freeman*, 3 Mer. 29. I went on a different ground: taking the answer to be that the defendant had received the 2,000*l.*, and admitting that he had made interest to a greater amount than I directed him to pay. I am very unwilling to carry the practice farther than it has been carried."

The order in *Wood v. Downes* was restricted to payment in of the sum due for principal only.

Where a trustee admits himself to be a debtor to his trust estate, the Court will, it seems, upon motion, order payment into Court of what is apparently a mere debt: the reason being (per Lord Cottenham, C., in *Richardson v. Bank of England*) that, "the person to pay and the person to receive being the same, the Court assumes that what ought to have been done has been done, and orders the payment, not as of a debt by a debtor, but as of moneys realized in the hands of the executor or trustee."

The mere existence of a discretionary power in trustees over a fund affords no reason why the

¹ V. & B. at p. 50.

Trustee debtor to trust estate.

⁴ My. & Cr. at p. 174.

Discretionary power in trustees over the fund.

Court should not order payment of the fund into court, unless such payment into court would interfere with the exercise by the trustees of such discretion. But where it appears that the trustees are about, in the due exercise of their discretionary power, to deal with a fund, the Court will not order payment into court, although the trustees have not actually parted with the fund: "not because such an order would necessarily interfere with the exercise of the discretion, but because it would create useless expense:" per Kindersley, V.-C., in *Talbot v. Marshfield*.

2 Dr. & Sm.
285.

18 Beav. 467.

Order at the
hearing.

In *The Governesses' Benevolent Institution v. Rusbridger*, the Master of the Rolls, Sir John Romilly, appears to have drawn some distinction between an application for payment into court by a party having a contingent interest in the trust fund made on an interlocutory motion and a similar application made at the hearing. His Honour said, "I think myself bound, *ex debito justitiæ*, to order the fund into court, but I never saw a case in which there was less danger. I cannot refuse a decree, but I will hear the plaintiffs why costs should not come out of the fund."

10 Ha. App.
xxx.

In *Isaacs v. Weatherstone*, Vice-Chancellor Wood ordered payment into court at the hearing without a notice of motion for that purpose.

Time for pay-
ment in.

If the fund is lent upon an unauthorized mort-

gage, a reasonable time will be given for payment into court: *Wyatt v. Sharatt*, where Lord Langdale, M. R., said, "The defendant ought to have some reasonable time to enable him to get in the mortgage." See, too, *Swaffield v. Nelson*, where Sir George Jessel, M. R., allowed six months to bring in funds invested upon equitable mortgages. If the fund is in the defendant's hands, the order will be for payment in forthwith; and an immediate order may be made for transfer of stock standing in the defendant's name: and if an order has been already made to restrain a transfer, the transfer into court may be ordered to be made "notwithstanding the injunction."

The notice of motion should specify the funds which the plaintiff desires to have brought into court: see *Nokes v. Seppings*. Fund should be specified. 2 Ph. 19.

The Debtors' Act, 1869, excepts from the operation of section 4, which abolishes imprisonment for debt, the case of (sub-sect. 3)—

"3. Default by a trustee or person acting in a fiduciary capacity, and ordered to pay by a court of equity any sum in his possession or under his control."

As to the present procedure in regard to attachment, see Ord. XLIV. and Ord. LII. r. 4, of the Rules of the Supreme Court, 1883. Ord. XLIV. and Ord. LII. r. 4.

In order to bring a trustee within the third When trustee

is within third exception. exception of section 4 of the act, it is not necessary that the money should have been in his sole possession or under his sole control. Where a sum of money, forming part of the assets of a testator's estate, was paid into a bank to the joint account of two executors, with power to one of them to draw cheques, and he drew out the money and misapplied it, and an order was made against both executors for payment of the money into court, it was held by the Lords Justices (affirming the decision of Sir George Jessel, M. R.), that the other executor was within the exception, and that a writ of attachment might be issued against him for non-payment of the money:

L. R., 10 Ch. *Evans v. Bear*.

App. 76.

When he is not.

Where, however, a trustee has been ordered to pay money, which he had neglected to recover, he is not within the third exception of sect. 4, and cannot be committed for default in paying the

L. R., 10 Ch. money: *Ferguson v. Ferguson*.

App. 661.

Debtors' Act,
1878 (41 & 42
Vict. c. 54).

By the act to amend the Debtors' Act, 1869, it is enacted, by sect. 1, that "In any case coming within the exceptions numbered 3 and 4 in the 4th section of the Debtors' Act, 1869, and in the 5th section of the Debtors' Act (Ireland), 1872, respectively, or within either of those exceptions, any court or judge making the order for payment, or having jurisdiction in the action or proceeding

in which the order for payment is made, may inquire into the case, and (subject to the provisos contained in the said sections respectively), may grant or refuse, either absolutely or upon terms, any application for a writ of attachment or other process or order of arrest or imprisonment, and any application to stay the operation of any such writ, process, or order, or for discharge from arrest or imprisonment thereunder."

Previous to the passing of this act, it had been held in *Evans v. Bear*, both by Sir George Jessel, L. R., 10 Ch. App. 76. M. R. (in the court below), and by the Lords Justices in the Appeal Court, that a writ of attachment for non-payment of money was a matter of right, and that the Court had no discretion to refuse it.

Under the amending act, the Court has refused 41 & 42 Vict. c. 54. to issue a writ of attachment against a defaulting trustee, where it appeared that the issuing of the writ would not induce the trustee to pay, he being unable to do so, and that no good purpose could be served by sending him to prison: *Barrett v.* 10 Ch. D. 285. *Hammond*, and the case, reported in the note thereto, of *Street v. Hope.* 10 Ch. D. 286, n. 13 Ch. D. 338.

But in the later case of *Marris v. Ingram*, Sir George Jessel, M. R., does not appear altogether to have agreed with the decision in *Barrett v.* 10 Ch. D. 285. *Hammond*. His lordship said, "The act (1869),

abolishes imprisonment for debt in the case of an honest debtor, but it is at the same time intended for the punishment of a fraudulent or dishonest debtor. It is in that sense vindictive, and intended to be so." And referring to the Amendment Act of 1878, his lordship said, that "it was not intended by this act (1878) to get rid of the penal clauses of the previous act, but only to give the judges a judicial discretion to deal with exceptional cases, which the legislature did not think of when it passed the previous act." In the case then before him, the learned judge said that the trustee had no merits whatever, "and he ought to be sent to prison unless he has no means, as to which I am not satisfied."

52 L. J. (N. S.) Ch. 685.

And in *Re Knowles*, where the Court was not satisfied that the trustee could not pay, Kay, J., observed, "I think that this is a case in which the punishment ought to be inflicted, for the purpose of teaching this man that a dishonest act of this kind will not be passed over with impunity, *even though he is unable to pay*, and for the purpose of teaching other trustees the same lesson—a very salutary one in many cases."

20 Ch. D.
532.
13 Ch. D.
338.

In *Holroyde v. Garnett*, Vice-Chancellor Bacon distinguished the case before him from *Marri v. Ingram*, and, on application for an attachment against a defaulting trustee, held that, the Court

having jurisdiction to inquire into the circumstances of the case, where there had been no actual fraud or embezzlement, but merely an erroneous application of the trust fund, the application might be refused. The trustee in this case offered to give a charge upon all his property, and the motion stood over until the charge was executed.

CHAPTER VII.

OF STRANGERS HELD RESPONSIBLE AS CONSTRUCTIVE TRUSTEES.

L. R., 9 Ch.
App. 244.

THE principles upon which the Court acts in extending the responsibility imposed upon trustees to others who are not properly trustees, were considered by the Earl of Selborne, L. C., in *Barnes v. Addy*; the facts in that case were shortly as follow:—The testator, William Addy, by his will appointed W. Crush, J. Lugar, and J. W. Addy, a nephew, to be his executors and trustees and the guardians of his infant children. He devised and bequeathed his real and personal estate to his trustees, upon trust to sell and convert the same and to invest the proceeds thereof, and, after giving an annuity to his widow, he declared that the residue should be held in trust for three daughters and one son equally. He then settled the share of one unmarried daughter, Ann, upon her for life for her separate use without power of anticipation, and after her death for her children as she should by deed or will appoint, and in default of any such appoint-

ment, and so far as any such should not extend, *Barnes v. Addy.* the share was to be held upon trust for such of her children as should attain twenty-one years equally: with the usual survivorship and maintenance clauses. The testator then settled the share of another unmarried daughter, Susan, in like manner. The power to appoint new trustees was vested in the executors without the consent of any other person; there was no authority to diminish the number of trustees.

The will was dated the 25th November, 1835; the testator died in the following month, leaving his widow and the four children named in the will.

Crush renounced and disclaimed: the will was proved by Lugar and J. W. Addy alone, who, after appropriating part of the estate to answer the annuity, invested the residue, about 9,000*l.*, in their names in consols.

In 1837, the daughter Ann married H. N. Barnes. The six plaintiffs were the children of this marriage.

In 1846, the daughter Susan married J. W. Addy.

Lugar and J. W. Addy appointed one Clark a trustee in the place of Crush. Lugar died in 1852, and Clark in 1857, leaving J. W. Addy sole trustee of the will.

*Barnes v.
Addy.*

Mr. J. Parker acted as solicitor to the trustees till 1851, when Mr. Duffield became solicitor to J. W. Addy in the place of Mr. J. Parker.

The shares of the son and the third daughter (Mary Myhill Addy) were paid to them: only the shares of Mrs. Barnes and Mrs. Addy remained subject to the trusts of the will.

Differences having arisen between Mr. Barnes and J. W. Addy, it was arranged that J. W. Addy should retire from the trust so far as the share of Mrs. Barnes was concerned, and that Mr. Barnes should succeed him as trustee of that share.

It appears that Mr. Duffield strongly advised J. W. Addy against adopting this course, pointing out to him the risk of a misapplication of the fund, if it was placed in the power of a sole trustee. Mr. Duffield, however, continued to act as the solicitor of J. W. Addy in carrying out the arrangement, and Mr. Preston acted as solicitor for Mr. and Mrs. Barnes.

The draft deed of appointment of Barnes as trustee of Mrs. Barnes' share, and draft deed of indemnity to J. W. Addy from Barnes, were prepared by Mr. Duffield, and sent by him to Mr. Preston, to peruse on behalf of Barnes, his wife, and their children. Preston, after stating all the circumstances as to the proposed sole appointment

of Barnes as trustee of her share, and the danger attendant thereon, to Mrs. Barnes, in writing, received from that lady, in writing, her statement that she was fully aware of the proposed arrangement, and wished it to be carried out. The deeds were approved by Preston on behalf of Mr. and Mrs. Barnes, and were executed by them in March, 1857. *Barnes v. Addy.*

On the last day of the same month, J. W. Addy, who had been introduced to a broker by Mr. Duffield as the vendor of so much stock as was required for the payment of certain arranged costs, completed the transfer, on his own responsibility, of the share of Mrs. Barnes, amounting to 2,074*l.* 17*s.* 8*d.*, 3*l.* per cent. consols, into the sole name of Barnes.

Barnes immediately sold the stock, used the money in his business, and, in February, 1858, became bankrupt.

The suit was instituted against J. W. Addy, who died during the progress thereof, and W. W. Duffield, and W. R. Preston, the two solicitors above mentioned.

The bill asked for a declaration that the appointment of Barnes as sole trustee was a breach of trust on the part of J. W. Addy: that the transfer to Barnes was not only a breach of trust by J. W. Addy, but a fraud by J. W. Addy, Duffield, and

G.

K

*Barnes v.
Addy.*

Preston, and that the three were liable to make good the consols and the dividends which would have accrued due thereon, but for the transfer to Barnes: and for accounts: and costs against all the defendants.

The suit was revived against the widow and administratrix of J. W. Addy.

Vice-Chancellor Wickens dismissed the bill with costs as against Duffield and Preston; but declared the estate of J. W. Addy liable for the loss.

From this decree, so far as it dismissed the bill against Duffield and Preston, the plaintiffs appealed. The appeal was dismissed with costs.

Ld. Selborne. In the course of his judgment, Lord Selborne, C., made the following observations: "Now in this case we have to deal with certain persons who are trustees, and with certain other persons who are not trustees. That is a distinction to be borne in mind throughout the case. Those who create a trust clothe the trustee with a legal power and control over the trust property, imposing on him a corresponding responsibility. *That responsibility may no doubt be extended in equity to others who are not properly trustees, if they are found either making themselves trustees de son tort, or actually participating in any fraudulent conduct of the trustee, to the injury of the cestui que trust.* But, on the other

hand, strangers are not to be made constructive trustees, merely because they act as the agents of trustees in transactions within their legal powers, transactions, perhaps, of which a court of equity may disapprove, *unless those agents receive and become chargeable with some part of the trust property, or unless they assist, with knowledge, in a dishonest and fraudulent design on the part of the trustees.*" With regard to Preston, Lord Selborne said, that if under the circumstances "we were to hold that he became a constructive trustee by the preparation of such a deed—(i. e., the deed appointing Barnes trustee)—*never having at any moment of time had any part of the trust fund in his possession, and not having enabled any one, who otherwise might not have had the power, to commit a breach of trust, we should be acting not only without authority, but, as I fully believe, against authorities which might have been referred to.*" As regards Duffield, the Lord Chancellor said, "We cannot, consistently with the evidence, or with justice, or reason, disbelieve Mr. Duffield, when he says he never knew nor suspected any dishonest purpose, or believed that any actual fraud would result from what was done: and if that be a true interpretation of the facts, I certainly, for one, am unable to hold him responsible."

It will be seen, therefore, that there is unquestionably a class of cases where the responsibility of the trustee may be extended to other persons; in other words, where the court will treat strangers as constructive trustees.

2 My. & K.
at p. 665.

Ld. Brougham
in *Docker v.*
Somes.

The doctrine is clearly referred to by the Lord Chancellor in *Docker v. Somes*, where he says, after pointing out that all gain made by a trustee through violation of his duty must go to the *cestui que trust*, "So it is also where one *not expressly a trustee has bought or trafficked with another's money*. The law raises a trust by implication, *clothing him, though a stranger, with the fiduciary character, for the purpose of making him accountable*. If a person has purchased land in his own name with my money there is a resulting trust for me: *if he has invested my money in any other speculation without my consent, he is held a trustee for me*: and so an attorney, guardian, or other person standing in a like situation to another, gains not for himself, but for the client, or infant, or other party whose confidence has been abused."

There can be no doubt, it is conceived, that if a solicitor, acting for a trustee, induce that trustee to let him take part of the trust fund, the solicitor giving to the trustee an unauthorized security (as an equitable mortgage), the Court would, on motion, order the solicitor to pay the money so

improperly secured into court, in a properly constituted action.

It will be observed that the expressions used by Lord Selborne in *Barnes v. Addy*, in reference to treating strangers as constructive trustees, are “actually participating in any fraudulent conduct of the trustee;” and, while excluding strangers, who merely act as agents for the trustee, from the class of constructive trustees, he carefully excepts those who “*receive, and become chargeable with, some part of the trust property.*” And in applying these principles to the case then before him, his lordship carefully pointed out that the solicitor, Preston, had never “*at any moment of time had any part of the trust fund in his possession.*”

In *Rothwell v. Rothwell*, the defendant Rothwell 2 S. & S. 217. covenanted on marriage to pay within twelve months after marriage 850*l.* to the trustees of his marriage settlement, upon trusts for the benefit of himself, his wife, and the issue of the marriage. The money not being paid, the children of the marriage filed a bill against their father, mother, and the trustees of the settlement, to have the trusts performed, and the 850*l.* got in, and invested upon the trusts of the settlement. Rothwell admitted the settlement: also that the 850*l.* had not been got in, but was in his hands. The Vice-Chancellor of England, Sir John Leach, on a

L. R. 9 Ch
App. 244.

Trust money
in hands of
defendant not
a trustee.

motion before decree that Rothwell might be ordered to pay the 850*l.* into court, said, "Where there is a clear admission that there is trust money *in the hands of a defendant*, the Court will make an interlocutory order for securing it in the name of the Accountant-General: *and the father's answer* contains a clear admission that this sum of 850*l.* trust money is *in his hands*."

16 Sim. 297. In *Rackham v. Siddall*, the marginal note states concisely, "A person who assumes the character of a trustee, incurs the responsibility of a trustee."

Person
assuming the
character of
trustee.

In that case the sole trustee of the testator's will devised, by his own will, all his real estates whatsoever and wheresoever unto and to the use of Grace Thompson, her heirs and assigns, charged with 50*l.* to his friend, John Watson, and appointed Watson sole executor in trust for Grace Thompson. After the trustee's death Grace Thompson sold part of the original testator's real estate, and allowed the purchase-money to be misapplied. Grace Thompson died, and the bill was filed seeking to make her estate liable, the plaintiffs being the mortgagees of the interest of the tenant for life, under the original will. The Vice-Chancellor of England, on this part of the case said, "*Then, inasmuch as Grace Thompson was not, in reality, a trustee, but did those various acts (about which there is no dispute) which*

showed that she assumed to herself the character of a *Rackham v. Siddall.*
trustee; and as she solemnly, in writing, acknowledged that she was a trustee; and as, when she was acting in that character, she enabled Mr. N. to get possession of the money, which, if she had acted consistently with her assumed character, she ought to have otherwise disposed of, the question is whether she was not answerable, and whether her representative is not answerable for the money?

“Now I must say that it would be a most glaring violation of justice if I were to decide that she was not answerable. If she had pleased, she might have refused to act: but, as she assented to act, she was bound to act properly; and she cannot screen herself from the consequences of her acts, merely by saying that she was not authorized to act: the fact being that she voluntarily made herself an instrument, by means of which a fraud was committed upon those who, in her assumed character, she ought to have protected. And therefore my opinion is that those who represent her are liable.”

On appeal, Lord Cottenham, C., affirmed this ^{1 Mac. & G. 607.} part of the decision, though the decree was varied. His lordship said, “I think, however, that the decree is right in making Grace Thompson liable.”

It appears clear, therefore, that where persons,

who are not trustees, get hold of the trust fund, and either retain it in their own hands, or allow it to pass from their custody, or improperly invest it, the Court will, for the protection of the beneficiaries, clothe these persons with a fiduciary character, and compel them to bring the fund into court, or to take such other action in the matter as the Court may consider it proper and expedient to direct.

CHAPTER VIII.

OF INVESTMENTS BY THE COURT.

WE have already seen (*ante*, p. 75), that the investment of cash under the control of the Court is now regulated by Rules 17 and 18 of Ord. XXII. Order XXII. rr. 17, 18. of the Rules of the Supreme Court, 1883; and that by the former of these rules, such cash may be invested in bank stock, East India stock, Exchequer Bills, and 2*l.* 10*s.* per cent. annuities; and upon mortgage of freehold and copyhold estates respectively in England and Wales, as well as in consolidated, reduced, and new 3*l.* per cent. annuities.

It may be mentioned that Rule 17 of Ord. XXII. differs from the Order of February, 1861, (which formerly regulated the investment of funds in court), only in this, that in the last-mentioned Order the words, "or subject to the order of" are wanting.

Sect. 10 of the act 23 & 24 Vict. c. 38, which Power to convert, &c. 23 & 24 Vict c. 38. enabled the Court to make general orders as to the investment of cash under its control, also enabled the Court to make such orders as should

be deemed proper for the conversion of any 3½ per cent. bank annuities, standing or thereafter to stand in court in trust in any cause or matter, into any such other stocks, funds or securities upon which cash under the control of the Court may be invested.

Order XXII. Rule 18 of Ord. XXII. relates to applications r. 18. for such a conversion, and is as follows:—

“18. Every application for the purpose of the conversion of any stocks, funds or securities into any other stocks, funds or securities authorized by the last preceding rule, shall be served upon the trustees thereof, if any, and upon such other persons, if any, as the court or judge shall think fit.”

Costs of application to vary.

The costs of an application to vary an investment are generally payable out of income: see 1 J. & H. 379. *Equitable, &c. Society v. Fuller*. But this is not so where a petition is otherwise necessary: see 2 J. & H. 458. *Re Langford's Trusts*.

Service on trustees.

It appears that service on the trustees of the fund is necessary in the case of applications under Rule 18 of Order XXII., but not in the case of applications under Rule 17 of the same Order:

W. N., 1868, *Re Adams' Will*.
p. 58.

W. N., 1868, In *Montefiore v. Guedalla*, the tenant for life of a fund in court invested in bank stock petitioned for a change of investment to East India stock.
p. 87.

The children of the petitioner (if he should have any) would be entitled to the reversion of the fund: he had been married for twenty-seven years, and had had no child. The persons entitled to the reversion in the event of the petitioner having no child concurred in the application. Lord Romilly said that he never sanctioned an investment in East India stock where infants were interested in the fund unless an increase of income was absolutely required for their maintenance: but in this case, considering the improbability of the petitioner having children, he would accede to the application.

And this principle—the desirability of increasing the parents' income for the benefit of the children—appears to have generally guided the Court in dealing with such applications. Increase of income for children's benefit.

Thus, where a tenant for life had a wife and five children, and his income, exclusive of that derived from a fund in court (6,357*l.* 15*s.* 2*d.* consols), was only 70*l.* per annum, the Court ordered an investment in bank stock: *Peillon v. 4 L. T.* 731. *Brooking.*

See also the case of *Cockburn v. Peel* (*ante*, ^{1 De G. F. & J. 170.} p. 76), where the fund was in court.

As to the investment of the proceeds of sale of consols in court in annuities created under the East Indian Railway Company Purchase Act,

30 W. R. 133. 1879, see the case of *In re Mansel*, before Mr. Justice Fry.

Exchequer Bills. Before the passing of 23 & 24 Vict. c. 38, it had been decided, in *Ex parte South Eastern Rail. Co.*, that Exchequer bills fell within the description of government securities: they are now, as we have seen, under Rule 17 of Order XXII., an authorized investment for cash under the control of the Court.

Order XXII. r. 17. Where the trust property, coming under the control of the Court, is of a wasting nature, the Court usually directs a conversion into 3½ per cent. annuities, notwithstanding Rule 17 of Order XXII.

Conversion directed by Court. Where the trust property, coming under the control of the Court, is of a wasting nature, the Court usually directs a conversion into 3½ per cent. annuities, notwithstanding Rule 17 of Order XXII.

India Stock. In the *Colne Valley and Halstead Railway Bill* the Lord Chancellor and the Lords Justices refused to sanction the investment of a fund in court in the purchase of India stock created under the East India Loan Act (22 & 23 Vict. c. 39), though the Court seemed to think that a trustee, acting out of court, would not be guilty of a breach of trust in making such an investment. This case was decided before the passing of the 30 & 31 Vict. c. 132 (*ante*, p. 72).

1 De G. F. & J. 53.

22 & 23 Vict. c. 39.

30 & 31 Vict. c. 132.

MORTGAGES.

Before the passing of the 22 & 23 Vict. c. 35, and 23 & 24 Vict. c. 38, the Court was very disin-

clined to allow funds in court to be lent on real security.

Thus, in *Ex parte Cathorpe*, an application was ^{1 Cox, 182.} made to invest on mortgage a fund in court belonging to a lunatic's estate: but the Lord Chancellor said, that though he was perfectly convinced that the security was a good one, yet he could not permit such a precedent to be made; his lordship directed the money to be laid out in the 3 per cent. bank annuities.

So, in *Norbury v. Norbury*, the Vice-Chancellor ^{4 Mad. 191.} of England refused a reference to the Master to inquire whether it would be for the benefit of infants that a fund should be laid out on mortgage instead of being applied in the purchase of 3 per cent. consols. His Honour said the Court had adopted the rule that investment in 3 per cent. consols was most beneficial to suitors of the Court, and never varied from this rule without special circumstances.

So, also, in *Barry v. Marriott*, Vice-Chancellor ^{2 De G. & Sm. 491.} Knight-Bruce declined to direct a reference, on a petition presented by tenant for life and infant remaindermen, as to whether it would be for the benefit of the infants to sell out the fund and invest the proceeds on mortgage of property mentioned in the petition: the trustees having power under the will to invest on real security. The

Vice-Chancellor said, that in ninety-nine cases out of a hundred the expenses of a mortgage security more than counterbalanced the increase of income.

7 De G. M. & G. 628. And in the case of *Baud v. Fardell*, Lord Justice Turner said that, "the Court in administering a trust never sanctions an investment on mortgage except under very special circumstances, though such an investment may be authorized by the instrument creating the trust."

These cases were before the Act of 23 & 24 Vict. c. 38, and the Order of February, 1861 (*ante*, p. 74), made in pursuance of that statute.

9 W. R. 729. In a later case, *Ungless v. Tuff*, where certain stock was ordered to be transferred into Court, the Master of the Rolls gave leave to the tenants for life to apply at chambers as to the investment of the fund on real security in England.

Real security in Ireland.
3 Beav. 430. Notwithstanding the provisions of 4 & 5 Will. 4, c. 29, Lord Langdale, M. R., in *Stuart v. Stuart*, refused even to direct a reference as to the propriety of investing a fund in court upon real security in Ireland. We have seen (*ante*, p. 105), that in *Ex parte French*, where the fund was not in Court, such an inquiry was directed. See also 7 Sim. 510. *Ex parte Pawlett*.
1 Ph. 570.

11 W. R. 713. In *Moore v. Walter*, the Court refused to sanction the investment of a fund in court in the purchase of freehold houses. Vice-Chancellor
House property.

Kindersley said, "As to the proposal to invest in house property, nothing could be worse: it was most objectionable, although that proposed was good of its kind."

Even where there is a power in the will to invest on *personal* or government security, if the estate is being administered by the Court, all moneys not already invested will be laid out on government securities. In *Holmes v. Moore*, where 2 Moll. 328. personal estate was bequeathed to a trustee to lay out on *personal* or government security, Lord Chancellor Manners, in Ireland, directed all future investments to be upon government security.

After a considerable conflict of decisions, it has now been definitely decided that moneys paid into court under the Lands Clauses Consolidation Act are cash under the control of the Court, and are therefore liable to be invested on such securities as are named in Ord. XXII. r. 17. The question was fully considered, and finally settled, in the case of *Ex parte St. John Baptist College, Oxford*. 22 Ch. D. 93. The facts were as follow: land in London, belonging to the College, was taken by the Metropolitan and District Railway Companies, under an act incorporating the Lands Clauses Act, and the purchase-money was paid into court. The College presented a petition asking that the money might be invested in India 3½. per cent. stock, or in

Personal
security.

Moneys paid
in under
L. C. C. Act.

Ord. XXII.
r. 17.

23 & 24 Vict.
c. 38.

India 4½. per cent. stock. Vice-Chancellor Hall refused to authorize an investment in India stock, and ordered an investment in consols, feeling himself bound by previous decisions to hold that money paid into court under the Lands Clauses Act was not cash under the control of the court within the Law of Property Act, 1860, s. 10. But, having regard to the contradictory decisions, his lordship expressed a wish that the matter should be brought before the Court of Appeal.

The petitioners appealed.

The earlier cases, in which the judges had differed in opinion, were brought to the attention of the Court, and are referred to on p. 94 of the report. In giving judgment, the late Master of the Rolls, Sir George Jessel, said: "I think that this money, which has been paid into court under the Lands Clauses Act, is cash under the control of the Court. When we look at the words of the 10th section of 23 & 24 Vict. c. 38, it appears to me clear that the expression must mean cash in court and nothing else. That section enables the Lord Chancellor, with the advice of the judges therein mentioned, to make such general orders from time to time as to the investment of cash under the control of the Court, either in 3½. per cent. consols, reduced, or new bank annuities, or in such other stocks, funds, or securities, as he,

with such advice, may think fit : and then it goes on to say, that it shall be lawful for the Lord Chancellor to make such orders as he may deem proper for the conversion of any 3 $\frac{1}{2}$ per cent. bank annuities then standing, or which might thereafter stand, in the name of the Accountant-General of the Court of Chancery in trust in any cause or matter, into such other stocks, funds, or securities, upon which by any such general order, cash under the control of the Court might be invested. Now, if the Court can convert any consols standing in the name of the Accountant-General in trust in any cause or matter, it would be extraordinary if it could not order the investment of cash standing in the name of the Accountant-General in any cause or matter. It is therefore plain that the words must mean cash standing in the name of the Accountant-General in any cause or matter."

Money in court under the Settled Estates Act, 1877, is, by section 36 thereof, directed to be invested as the Court shall direct, "in some or one of the investments in which cash under the control of the Court is for the time being authorized to be invested."

Settled
Estates Act,
1877.
Sect. 36.

By sect. 32 of the Settled Land Act, 1882, money in Court under the Settled Estates Act, 1877, or under an Act incorporating the Lands Clauses Acts, or under any other Act, public, local,

Settled Land
Act, 1882.
Sect. 32.

personal or private, liable to be laid out in the purchase of land, to be made subject to a settlement, may be invested or applied as capital money arising under the Settled Land Act, 1882.

Sect. 21.

By sect. 21 of the Settled Land Act, 1882, capital money arising thereunder may, subject as therein is mentioned, be invested—

“(1) In investment on government securities, or on other securities on which the trustees of the settlement are by the settlement or by law authorized to invest trust money of the settlement, or on the security of the bonds, mortgages, or debentures, or in the purchase of the debenture stock of any railway company in Great Britain or Ireland, incorporated by special act of parliament, and having for ten years next before the date of investment paid a dividend on its ordinary stock or shares, with power to vary the investment into or for any other such securities.”

23 Ch.D. 171. In the case of *In re Byron's Charity*, lands belonging absolutely to a charity were taken by a railway company, and the purchase-money was paid into court under the Lands Clauses Act: it was held by Mr. Justice Fry, that the 32nd section of the Settled Land Act must be read with the

Settled Land Act, ss. 21, 32, and L. C. C. Act, s. 69.

69th section of the Lands Clauses Act, and that the purchase-money could be dealt with under the provisions of sect. 32 of the Settled Land Act, 1882, as "money liable to be laid out in the purchase of land to be made subject to a settlement."

An interim investment in debenture stock of the L. & N. W. Railway Company was ordered. But as to this case, see Wolstenholme & Turner, 2nd ed., p. 50, on the Settled Land Act.

The Court will sanction the interim investment on real security of purchase-money paid into court under the Lands Clauses Act. Interim investment on real security.

In the case of *In re William Smith's Estate*, a petition was presented asking for the interim investment on a mortgage of a freehold estate of part of a fund paid into court by a local board under the Lands Clauses Act. Vice-Chancellor Malins said, that the 70th section of the Lands Clauses Act distinctly provided for temporary investment in real securities, and that such an investment is perfectly proper if the security is such as the Court approves. An inquiry was directed as to the sufficiency of the proposed security. L. R., 9 Eq. 178.

In the case of *In re Redhead*, the same learned judge sanctioned the investment of a fund paid W. N. 1878, p. 194.

Metropolitan stock. into court under the School Board Act, in stock of the Metropolitan Board of Works.

Copyhold Acts, Ecclesiastical Estates Act, Inclosure Act, Legacy Duty Act, Parliamentary Deposit Act, Trustee Relief Act. Since the above-quoted decision of the Court of Appeal in *Ex parte St. John Baptist College, Oxford* (*ante*, p. 207), it is conceived that money paid into court under any of the acts referred to in the margin may be dealt with as cash under the control of the Court, though provision has been made for the investment of moneys paid into court under each of these acts: but in the absence of special circumstances an investment in consols would probably be directed.

Life Assurance Acts, 1870—1872. 1872, and the Tramways Act, 1870, the provision for investment is “in such stocks, funds, or securities as the applicants desire or the Court thinks fit.”

Tramways Act, 1870. Board of Trade Rules, August, 1872. Investments by Paymaster-General. As to the procedure on investments by the Paymaster-General, see the Supreme Court Funds Rules, 1886: also Seton, 85 *et seq.*; and Daniell's Chancery Practice (6th edition), 1767 *et seq.* The Chancery Funds Consolidated Rules, 1874, and the Rules of 1884, are revoked.

Effect of decree on discretion of trustees as to investment. When a decree has been made for administration it appears that all the powers of management of the estate which may be vested in trustees become subject to the control of the Court. The

question was considered by Sir George Jessel, M. R., in the case of *Bethell v. Abraham*. There, ^{L. R., 17 Eq. 24.} trustees, having power to invest certain moneys belonging to the testator's estate at their discretion, and power to continue or change securities from time to time as to the majority should seem meet, applied to the Court in an administration action for liberty to invest the moneys in, and to convert securities into, American funds or railway stocks: infants were interested in the estate. It was held that, even if the trustees had the discretion they claimed, the Court ought not, in a case where infants were interested, to permit them to exercise that discretion in the way they proposed. The late Master of the Rolls said, "I am not satisfied that the trustees have the power they claim. . . . But if they have the power they claim, I am not satisfied that I ought to exercise the power (which I undoubtedly have) of controlling their exercise of discretion in the way which they desire, namely, by acceding to the request to make these investments, which, in the eye of this Court, are speculative. I do not say they are really such; for that I know nothing about; but they are speculative so far as this Court is concerned: so that even if I thought the construction of the will other than I do think it, I should not grant this

application. However, I should like to say this, that (if I rightly understand the doctrines of the Court) as long as an estate remains to be administered in this Court, *the Court does not allow a purchase to be made, or a mortgage, or any other investment to be made, unless the Court is satisfied of its safety.* There is a reason for that. The Court has to protect the property for all claimants, and even where the trustees have an undisputed power to make a purchase, or to make a mortgage, a reference is made, generally to chambers, to ascertain the propriety of the investment which is intended to be made, that is to say, its propriety in all respects. . . . I do understand the practice of the Court to be that a judge does exercise a personal discretion, that is, exercises a discretion according to his own judgment as to the safety and propriety of a proposed investment."

W. N. 1883,
p. 29.
Discretion in
Court to
retain unau-
thorized
investments.

It is said in the note of *Fox v. Dolby*, that the Court has a discretion to allow trustees to retain investments not authorized by the trust, if it is shown to be for the benefit of infants that this should be done. But that the Court will not exercise this discretion, but on the contrary will order the unauthorized securities to be converted, unless special circumstances are shown to exist:

and that the mere fact that the unauthorized securities are such as are authorized by sect. 21 of the Settled Land Act, 1882, and that a loss of income would be caused by the conversion, is not enough to induce the Court to allow the securities to be retained.

It is stated generally in *Seton*, that where the fund in court is subject to a trust for investment, the investments authorized by the trust will, if otherwise unobjectionable, be allowed. Page 87.
Where fund
in court
subject to
trust for
investment.

Attention may be called here to the case of *The Attorney-General v. Marquis of Ailesbury*, where certain funds in court, being the accumulations of the personal estate of a lunatic, had, under orders of the Lords Justices, been invested in the purchase of lands. In pursuance of these orders the lands were conveyed "unto and to the use of the" committees, "their heirs and assigns for ever, upon trust for" the lunatic, "his executors, administrators and assigns": certain powers of leasing and sale were given to the committees, and the deeds of conveyance contained a declaration that the lands should be considered part of the lunatic's personal estate, but they contained in terms no trust for sale. It was held by the Court of Appeal, reversing the judgment of the Queen's Bench Division, that the value of the lands thus bought was 16 Q. B. D.
408.

Investment of
personal
estate of
lunatic in
land.

14 Q. B. D.
895.

not part of the lunatic's personal estate and effects at his decease, and was not liable to probate duty as part of the estate and effects in respect of which administration might be granted to his personal representatives.

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A fine of five cents a day is incurred  
by retaining it beyond the specified  
time.

Please return promptly.

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